TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 192.

LENA M. SLATER, W. G. SLATER, JESSE M. SLATER, ANNIE E. SLATER, AND HENRY A. SLATER, PETITIONERS,

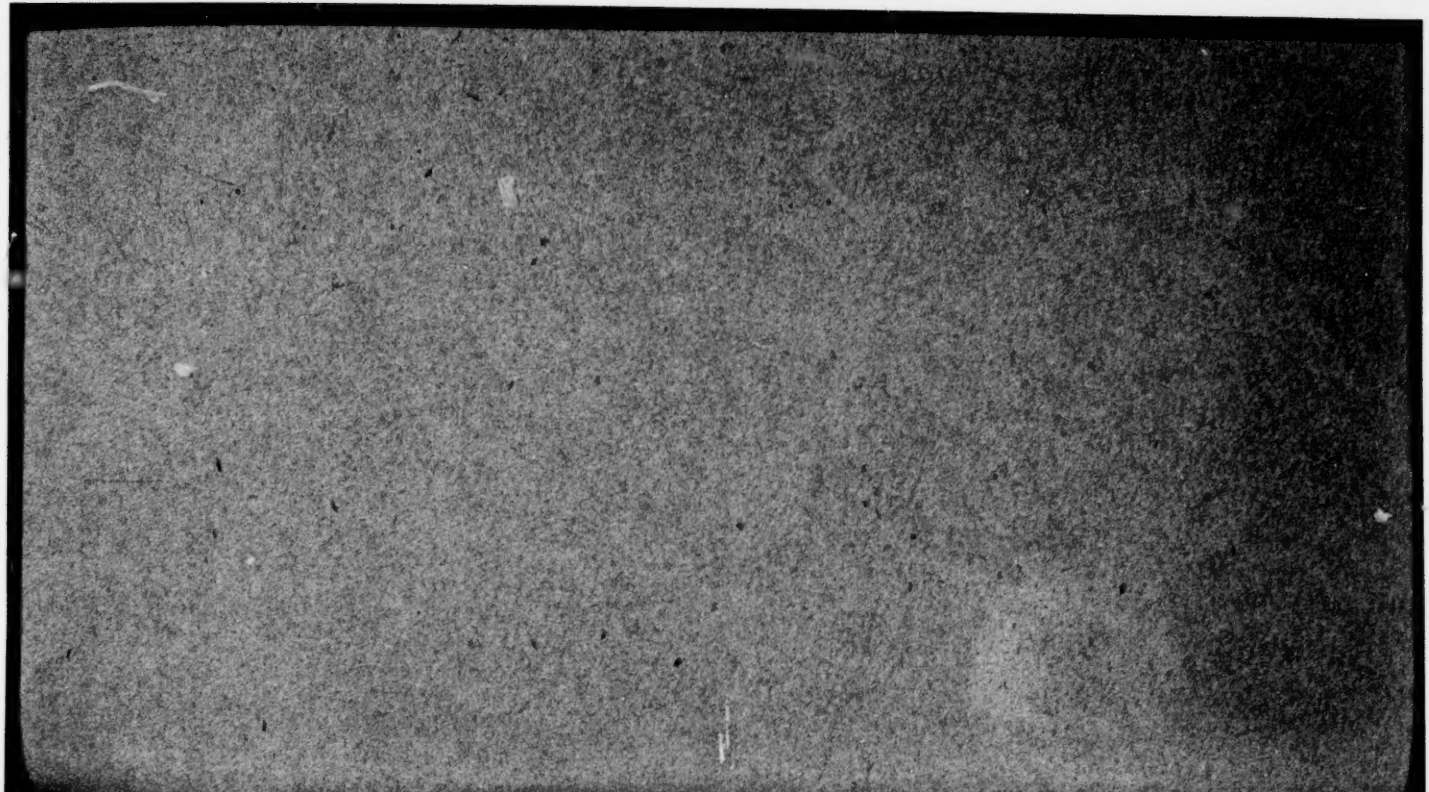
vs.

THE MEXICAN NATIONAL RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 21, 1908.
CERTIORARI AND RETURN FILED OCTOBER 12, 1908.

(16,743.)



(18,741.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 162.

LENA M. SLATER, W. G. SLATER, JESSE R. SLATER, ANNIE E. SLATER, AND HENRY G. SLATER, PETITIONERS,

vs.

THE MEXICAN NATIONAL RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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A.

CAPTION.

UNITED STATES OF AMERICA,
FIFTH JUDICIAL CIRCUIT.

Pleas and Proceedings, had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the third Monday of November, 1901, and held in the Court room of said Court, in the City of New Orleans; before the Honorable Don A. Pardee, and Honorable A. P. McCormick, and the Honorable David D. Shelby, United States Circuit Judges, for the Fifth Judicial Circuit.

THE MEXICAN NATIONAL RAILROAD COMPANY,
Plaintiff in Error,

versus

LENA M. SLATER, WILLIAM F. SLATER, JESSE R. SLATER, ANNIE E. SLATER AND HENRY G. SLATER, SURVIVING WIFE AND CHILDREN OF WILLIAM H. SLATER, DECEASED.

Be it Remembered, That heretofore, to wit: on the 21st day of May, 1901, a transcript of the record of the above styled cause from the Circuit Court of the United States for the Western District of Texas, was filed in the office of the Clerk of said United Stated Circuit Court of Appeals for the Fifth Circuit, in the words and figures following, to-wit:

TRANSCRIPT.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT, AT NEW ORLEANS.

THE MEXICAN NATIONAL RAILROAD COMPANY,
Plaintiff in Error,

VERSUS

LENA M. SLATER, ET ALS.,
Defendants in Error.

CAPTION.

BE IT REMEMBERED, That on this the 18th day of March, A. D. 1901, it being the third Monday in said month, and the day fixed by law for the commencement of the regular term, the Circuit Court of the United States for the Western District of Texas, at Laredo, met pursuant to law.

Present: Honorable T. S. Maxey, United States District Judge; Honorable Henry Terrell, United States District Attorney; G. J. Schermack, Chief Deputy United States Marshal, and Geo. B. Hufford, Deputy Clerk of said Court.

Whereupon the following proceedings were had:,

Lena M. Slater, et als.,
vs. No. 3.
The Mexican National Railroad Company.

2 PLAINTIFFS' ORIGINAL PETITION.

In the Circuit Court of the United States for the Western District of Texas, at the City of Laredo.

Suit at Law.

Lena M. Slater, et als., Plaintiffs,
vs. No. 3.
Mexican National Railroad Company, Defendant.

To the Honorable Judges of said Court:

Now comes Lena M. Slater, and Willliam F. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater, minors, joined herein and represented by their next friend, Lena M Slater, hereinafter styled plaintiffs, and complaining of the Mexican National Railroad Company, hereinafter styled defendant, respectfully represents to the Court:

I. That plaintiffs are citizens of and reside in the County of Webb and State of Texas, and the defendant is a private corporation, chartered, organized and existing under and by virtue of the laws of the State of Colorado, and that it is a citizen of the State of Colorado, and that it owns and operates and at the times hereinafter mentioned has owned a line of railway from the City of Laredo, Webb County, Texas, to the City of Mexico, in the Republic of Mexico, carrying on and conducting the ordinary business of a railway company as a common carrier of passengers and merchandise for hire, and that J. N. Galbraith, who resides in Webb County, Texas, is its superintendent and local agent in Webb County, Texas, upon whom service of citation may be had.

II. That Lena M. Slater is the surviving wife of William H. Slater, deceased, and that William F. Slater, Jesse R. Slater, Annie E. Slater and Henry C. Slater, are the minor children of the plaintiff, Lena M. Slater, and the said William H. Slater, deceased.

III. That heretofore, to-wit: on or about the 20th day of May, A. D. 1900, and for a long time prior thereto, William H. Slater, deceased, was an employe of the defendant, and in the employ of said defendant as a switchman or brakeman, and on said date was engaged in his usual and customary duties as such switchman in the City of Nueva Laredo, Republic of Mexico, in the yards of said defendant company at said place.

IV. That at the said time and place and while so employed in the service of said defendant, in the discharge of his duties incident to his employment, the said William H. Slater, deceased, went in between two freight cars belonging to said defendant, to make a coupling, and while so employed in the service of de-

fendant, and acting under the direction of the said defendant company, by and through the negligence of the said company, its agents, servants and employes, he was mashed, bruised and injured so that on the following day, in the City of Laredo, Texas, he died of said injuries. That the said injuries which caused the death of the said William H. Slater were caused wholly through the fault and negligence of the defendant, and without any contributory negligence on part of the said deceased, or any of these plaintiffs.

V. That at the time that the said injuries occurred the said William H. Slater was acting under direction and control of defendant's yardmaster at said Nueva Laredo, and was in the discharge of the duties assigned to him; that the cars which the said Slater was attempting to couple at the time he received his said injuries, were flat cars; that the draw-heads of one of said cars was higher than the draw-head of the other car, and the centers of the said draw-heads were not opposite, but on the contrary the respective heights of said draw-heads were so unequal; that when the said two cars came togehter, one of the said draw-heads could pass over the other, and when said William H. Slater went in between the cars to make the coupling, one of which was standing still and to other being moved by an engine, the high draw-head passed above and on top of the low draw-head and permitted the ends of the two cars to come together and mash and injure the said William H. Slater so that he died as aforesaid.

VI. That it was the duty of the defendant to furnish safe and suitable appliances, machinery and cars for the said William H. Slater to work with and about, and it was its duty to, carefully to inspect said cars and at all times see that the same were reasonably safe and free from defects; that defendant failed to furnish safe and suitable cars and appliances and wholly failed to inspect the same and to see that the said cars were reasonably safe for the use of the said Slater, but defendant negligently, carelessly and wrongfully failed to inspect said cars, and failed to have them in a safe and suitable condition; that the said defendant, its agents, servants and employes knew, or by the exercise of ordinary care could have known, of the defect of said sars, and could and should have known that the said draw-heads were not of the same height; that by reason of the negligence and carelessness of the defendant the said William H. Slater was injured and killed, as aforesaid.

VII. That Lena M. Slater is about forty years of age, and that William F. Slater is fourteen years of age; Jesse R. Slater, twelve years of age; Annie E. Slater, six years of age, and Henry C. Slater is six months of age. That William H. Slater, at the time of his death, was forty-three years of age, and was an experienced brakeman; that he was in good health, was strong, frugal and industrious, and during his life-time had performed

and was capable of performing a great deal of labor. He was a man of good moral character, and was sober and industrious and at the time of his death was earning about the sum of one hundred and twenty-five dollars ($125.00) per month. That he [was] kind and indulgent to his wife and children, and during his married life he gave practically all of his earnings aforesaid to their support and maintenance.

VIII. Decedent's expectancy of life, according to the standard tables of mortality, was about thirty years, and plaintiffs, during their lives, reasonably expected to receive, and in fact, would have received in money from the earnings of deceased, thirty thousand dollars ($30,000.00); that plaintiffs were each dependant for their support and maintenance upon the earning of deceased, upon which fact and other considerations, particularly the legal obligation of the deceased to support them, and the love and affection for them they base their expectations of pecuniary aid from said deceased.

That said plaintiffs by reason of the negligent killing of the said William H. Slater in the way and manner aforesaid have sustained actual damage in the sum of thirty thousand dollars ($30,000.00), for all of which, by reason of the premises, defendant corporation has become liable; and that plaintiff and those for whom she sues as aforesaid are the only persons entitled to damages for injuries resulting in the death as aforesaid.

IX. Plaintiffs further allege that by the laws of Mexico which now exist and existed and were in force at the time and place of the happening of the killing of William H. Slater through the defendant's negligence, as aforesaid, they the plaintiffs, have had the right of action against the defendant for their damages, and they say that the following were, and are now, the laws of Mexico, applicable to this case, out of which the said right of action grew, and by virtue of which the same now exists in the said Republic of Mexico, to-wit:

From the Federal Constitution of the Mexican United States.

4 "Art. 72. Congress has power * * * (22) To enact laws governing the general lines of communication, and governing postoffices and mails."

"Art. 97. The Federal Courts has jurisdiction: (1) Of all questions growing out of the execution and application of the Federal Laws, except when the application of the law only affects interests of individuals, in which case the local Judges and Tribunals of the State shall entertain jurisdiction."

From the Penal Code of Mexico.

"Art. 4. A crime is a voluntary infraction of the penal law,

doing that which it prohibits, or neglecting to do that which it commands.

"Art. 5. A misdemeanor is the infraction of police regulations or proclamations and good government.

"Art. 6. There are intentional crimes, and crimes resulting from neglect.

"Art. 11. Negligent crimes exist: (1) Where an act is done, or a duty omitted, which, although lawful in itself, is not so by reason of its consequences, if the accused fails to provide against the consequences, through negligence, want of reflection or care, by not making proper investigations, by not taking necessary precautions or through unskillfulness in any art or science, the knowledge of which is necessary in order that the act done may not result in injury. Unskilifulness is not punishable when he who does the act does not profess the art or science necessary to be known, and acts when impelled by the gravity and urgency of the case. * * * (3) Where the question relates to an act which is punishable solely by reason of the circumstances under which it is done, or by reason of a circumstance personal to the party aggrieved; if the accused is ignorant of such circumstance, through not having previously made the investigation which the duty of his profession or the importance of his case demands."

Pen. Code Bk. 2. "Civil Liability in Criminal Matters."

"Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses.

"Art. 304. Reparation comprehends: Payment of all damages caused to the injured party, his family or a third person for the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, a proximate and inevitable consequence.

"Art. 305. Indemnization imports: The payment of damages, that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an act of omission by which a formal, existing and not merely possible right is attacked, and for the value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done conformably with civil right.

"Art. 306. The condition required by the two preceding articles, that the damages and injuries should be actual, shall not prevent that the indemnization of subsequent damages and injuries be exacted by a new suit, when they shall have accrued; if they proceed directly from, and a necessary consequence of, the same act or omission from which resulted the previous damages or injuries.

"Art. 307. The payment of judicial expenses solely embraces those absolutely necessary, which the injured party incurs for the purpose of investigating the act or omission which causes the criminal proceeding and to avail himself of his rights in such proceeding or in the civil suit.

"Art. 308. The civil responsibility cannot be declared except at the instance of the party entitled to recover.

"Art. 309. The Judges who adjudicate upon the civil responsibility shall be controlled by the provisions of this title, in so far as its provisions extend; on other questions, they shall follow, according to the nature of the suit, the provisions of the civil or of the commercial laws which may be in effect at the time of the happening of the act or omission causing the civil responsibility.

"Art. 310. The right to civil responsibility forms a part of the estate of a decedent and descends to his heirs and successors, provided it be not the case of the following article, or that it arise from injury or defamation, and that, the offending person having been able in the life-time to bring his suit, he neither did so nor directed his heirs to sue; in such case the offense shall be understood as remitted.

"Art. 311. The action to enforce civil responsibility demanding support of a person guilty of homicide is personal, and belong exclusively to the persons named at the end of article 318 as directly damaged. Consequently such action forms no part of the estate of the deceased, nor is it extinguished, although the latter pardon the offense in life.

"Art. 318. The civil resonsibility that grows out of a homicide done without right (or justification) comprehends the payment of the indispensible expenses of the burial of the body, the expenses and necessary charges made for the cure of the deceased, the damages that the homicide causes to the property of the deceased, and of the support not only of the widow, descendants and ascendants of the deceased, who were being supported by him, he being under legal obligations to do so, but also to the posthumous descendants that he may leave.

"Art. 319. The obligation to furnish support shall last during all the time that the deceased might have lived if the homicide had had not killed him, and that time shall be calculated by the Judges according to the table at the end of this chapter, but taking into consideration the state of the health of the deceased before the homicide was committed. As limitation of this rule the obligation shall cease: 1. At whatever time it shall not be absolutely necessary for the subsistance of those entitled to receive it. 2. When those beneficiaries get married. 3. When the minor children become of age. 4. In any other case in which, according to law, the deceased, if alive, would not be required to continue the support.

"Art. 320. In order to fix the amount which should be given as the measure of support, the ability of the party responsible for the

killing shall be taken into consideration and the necessities and circumstances of the persons entitled to receive it."

"Art. 325. * * * * Table of mortality and expectancy of life.

A	10.....	Corresponded	.....40.80
"	15.....	"	.....37.40
"	20.....	"	.....34.26
"	25.....	"	.....31.34
"	30.....	"	.....28.52
"	35.....	"	.....25.72
"	40.....	"	.....22.89
"	45.....	"	.....20.05
"	50.....	"	.....17.23
"	55.....	"	.....14.51
"	60.....	"	.....11.05
"	65.....	"	.....09.63
"	70.....	"	.....07.58
"	75.....	"	.....05.87
"	80.....	"	.....04.60
"	85.....	"	.....02.00

6 Federal Civil Code, Chap. IV.

"Art 205. The obligation to give support is reciprocal; he that gives support has at the same time the right to ask it.

"Art. 206. Married people in addition to the general obligation imposed by matrimony, have that of giving support in cases of divorce and others designated by law.

"Art. 207. Fathers are obliged to support their children. If it should be impossible for parents to do so, or should they be unable to do so, the obligation falls upon other ascendants by both lines of ascendancy who are nearest of kin.

"Art. 208. The children are obliged to give support to their parents. If it is impossible for the children to do so, or they are unable to do so, then those descendants next in kin are obliged to do so.

"Art. 211. The support comprehends eating, dress, habitation and assistance in case of sickness.

"Art. 212. In regard to minors support it comprehends in addition to the necessary expenses for the primary education of the party entitled to support, and to furnish him some calling, art or profession, honest and adequate to his sex and personal circumstances."

"Art. 214. The support should be proportioned according to the abilities of those who have to give it, and the necessities of those who have to receive it."

"Art. 220. The assurance of the support may consist in a mortgage, bond or deposit of sufficient amount to cover the support."

"Art. 225. The right to receive cannot be renounced nor is it an object of transfer or assignment."

Pen. Code Bk. 2.

"Art. 313. The Judges who take cognizance of suit based upon civil responsibility shall endeavor that the amount and terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following article shall be observed: * * * *

"Art. 321. In case of blows or wounds, from which the injured party does not remain crippled, lamed or deformed, he shall have the right that the responsible party pay all his expenses of cure, the damage he may have suffered, and that which he may fail to gain during the time which, in the opinion of competent persons, he may not be able to do the work by which he subsists. But it is essential that the inability to work should be the direct result of the wounds or blows, or be a cause which is the immediate effect of such blows or wounds.

"Art. 322. If the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which [he] shall recover, and can properly devote himself to other and different work, which may be lucrative and appropriate to his education, habits, social position and physical constitution, the civil responsibility shall be reduced to paying him the sum which his liability to earn in his new employment falls short of his daily earnings in his former occupation.

"Art. 323. If the blows or wounds cause the loss of any member, not indispensible for work, or the person wounded or struck remain otherwise crippled, lame or deformed, by that circumstance he shall have the right not only to the damages and injuries, but also to the sum which the Judge may determine as extraordinary indemnity, considering the social position and sex of the person and part of the body remaining crippled, lamed or deformed."

"Art. 324. The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability."

"Art. 325. The provisions of the foregoing articles for computing the civil responsibility for wounds or blows shall be applied to all other cases where, in the violation of a penal law, a person may cause the illness of another, or may have placed him under a disability to work."

"Art. 326. No person shall be charged upon a civil liability upon an act or omission contrary to a penal law unless it be proven; that the party sought to be charged usurped the property of another; that without right he caused, by himself or by means of another, damages or injuries to the plaintiff; or that, the party

sought to be charged being able to avoid the damages, they were caused by a person under his authority.

"Art. 327. Whenever any of the conditions of the preceding articles are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability."

"Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 326 and 327, it is an indispensable condition that the act or omissions of the clerks or servants causing the liability shall occur in the service for which they were employed.

"Art. 331. Under the conditions of the preceding article, those liable are * * * railroad companies.

"Art. 363. Limitations: The various actions by which civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked shall be extinguished according to the terms and in the manner provided by the civil code of the commercial code, according to the nature of the demand and the subject-matter treated of.

"Art. 364. Amnesty shall not extinguish the civil responsibility, nor the actions to exact it, nor the legal rights which third persons may have acquired. Nevertheless, when the responsibility may not yet have been made effective, and the demand is not for restitution, but for reparation of damages, for indemnity for injuries, or for the payment of judicial expenses, the guilty person shall remain free from such obligations only when it is so declared in the amnesty and they are expressly left to the charge of the public treasury.

"Art. 365. A pardon shall in no case extinguish civil responsibility nor the action to enforce it, nor the legal rights which third persons may have acquired.

"Art. 366. Limitation is interrupted by criminal proceeding until final judgment is pronounced. This done the term of limitation commences to run anew.

8 Transitory Law: Pen. Code.

"Art. 26. Until it is determined in the new code of procedure what judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following rules shall be observed: * * * * (5) Actions to enforce the civil liability may be brought before the Court of civil jurisdiction, whether or not the criminal proceeding has been commenced; but while the latter is pending the proceeding in the former shall be stayed."

From the Federal Civil Code.

"Art. 9. Against the observance of the law, disuse, custom or practice to the contrary cannot be alleged."

"Art. 20. When a judicial controversy can be decided neither by the text nor the natural meaning or spirit of the law, it must be decided according to the general principles of right, taking into consideration all the circumstances of the case.

"Art. 21. In cases of conflict of rights and the absence of express law for the special case, the controversy shall be decided in favor of him who seeks to avoid damages, and not in favor of him who seeks to obtain profit. If the conflict should be between equal rights, or rights of the same specie, it shall be decided by observing the greatest equality possible between the parties.

"Art. 1095. Limitation bars in three years * * * * (8) Civil responsibility for injuries, whether done by word or by writing, and that which arises from damage caused by persons or animals, and which the law imposes upon the representatives of such persons or the owners of the animals.

Act of Congress of December 15, 1881.

"Art. 1. The executive shall regulate the service of railroads, telegraphs and telephones constructed, or which may in the future be constructed, upon Mexican territory, according to the following basis: (1) Railroads, telegraphs and telephones which in the Federal District and territory of Lower California unite together two or more municipalities, or Federal District and territory of Lower California with one or more states; those which communicate two or more states with each other; those which touch any point in the territorial boundary line of the republic and foreign countries, or run parallel therewith within a region of twenty leagues, are known as general lines of communication within the meaning of fraction 22 of article 72 of the constitution. (2) These general lines of communication and their branches shall be subject exclusively to the federal legislature, executive and judicial powers, in their respective spheres, in all cases where any of the following matters are involved: * * * * (g) Construction and repair of the works. Crimes committed against the security or integrity of the works or against the operation of the lines. (h) Security of the same works for which the companies, through delays or obstructions, carelessness or fault in the service or for accidents or mishaps in the operation.

From the Regulations for the Construction, Maintenance and Operation of Railroads.

"Art. 52. The coaches and cars which enter into the makeup of a train shall have draw-heads of the same height, so that their centers will be opposite to each other.

9 "Art. 53. No car of whatever kind shall form a part of the make-up of a train, unless the same shall have been previously inspected very carefully.

"Art. 99. The company shall be responsible for the moving of all trains on its road.

"Art. 184. Companies (railroad) are liable for all faults and accidents which occur through tardiness, negligence, imprudence or want of capacity of their employes.

"Art. 208. All violations of this law which companies (railroad) commit shall be subject to punishment by the administration of a fine up to five hundred dollars, which the department of public works shall assess, reserving always the right of individuals through indemnity and the liabilities which the companies may incur through criminal acts or omissions committed by them."

Plaintiffs further allege that by reason of the general statutes of the State of Texas and by virtue of general principles of right and justice and of the laws of Mexico hereinbefore mentioned, they had and now have a right of action for their damages against in the Republic of Mexico, and the same now exists in said country as well as in the State of Texas, and in the United States of America. And they say that the acts of negligence upon the part of the defendant, its agent, servant and employes were wrongful and actionable, as has been hereinbefore shown by the plaintiff in the Republic of Mexico at the time of the killing complained of and are now so, and they say that the same were then and are now wrongful and actionable in the United States of America, and in the State of Texas. And plaintiffs say that by reason of the negligent killing of the said William H. Slater, they have suffered damages in the sum of thirty thousand dollars ($30,000.00).

Wherefore, premises considered, plaintiffs pray that defendant be cited to answer this petition and that they have judgment for their said damages and that said damages be apportioned among the plaintiffs as they may be found to share therein, and that they have judgment for all costs of suit and for general and special relief.

KELLER & WILLIAMS,
Attorneys for Plaintiffs.

(Indorsed:) No. 3. Lena M. Slater, et als, vs. Mexican National R. R. Co. Original Petition. Filed this 17th day of Nov., 1900. D. H. Hart, Clerk, by Geo. B. Hufford, Deputy.

DEFENDANT'S ORIGINAL ANSWER.

Filed December 4, 1900.

10 In the United States Circuit Court for the Western District of Texas, at [Laredo].

Lena M. Slater, et als, Plaintiffs,
vs. No. —
Mexican National Railroad Company, Defendants.

Now comes defendant and says that the allegations in plaintiff's petition are wholly insufficient to require further answer of this defendant, and of this it prays judgment of the Court.

1st. And specially excepting defendant says that it affirmatively appears from the petition of the plaintiff that the wrong charged to have resulted in the death of Wm. H. Slater occurred in the Republic of Mexico and not within the jurisdiction of this Court.

2nd. That it affirmatively appears from the allegations of said petition that the laws of Mexico, where the wrong is alleged to have occurred, are not similar or analogous to the laws of Texas, but that the same are dissimilar and different to the laws of Texas, in this, that under the laws of Mexico, plead by plaintiffs in said petition, the parties entitled to institute and maintain suits for wrongs resulting in death, are not the same as in Texas; and in this, that they are dissimilar in many other respects made obvious by an explanation of the laws of Mexico plead by plaintiffs; and in this, that under the laws of Texas, it is provided that in order to authorize a recovery for the death of another that the wrongful act, negligence, carelessness, unskilfulness or default causing the death of another must be of such a character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury, whereas there appears no such limitation upon the survivor under the laws of Mexico, upon the contrary, it appears that a cause of action in favor of certain named persons would exist, notwithsanding the injured person during life has extinguished said cause of action; and in this, that under the laws of Texas, in like cases, the recovery would be "in solidum," while under the Mexican laws plead such a recovery is not intended or contemplated, but must be in installments not to exceed the amounts contributed by the deceased during life in support of the beneficiaries or persons entitled to be supported by the deceased.

3rd. And especially further, plaintiff's petition affirmatively shows that plaintiff's right to recover damages in Mexico, if any, depends wholly upon an infraction of a penal statute of the Republic of Mexico; that to authorize a recovery under the laws of Mexico this Court must find the act or omission charged to be a violation of the penal code of Mexico, portions of which are set up in plaintiff's petition; that said laws have no extra-territorial effect,

and this Court has no jurisdiction to determine such matters, or to adjudge damages based upon a penal statute of a foreign government.

4th. And for further exception, it does not appear that said cause of action is by all parties authorized under Mexican law to maintain an action for recovery of damages, nor does it appear for the use of all persons, that might be entitled to recover damages for the wrongful killing of another, but is for the sole use of the wife and children not negativing the existence of others entitled to recover under the Mexican law and is therefore not authorized by the Texas statute, but is in direct violation thereof, and if entertained would subject defendant to a multiplicity of
11 suits, contrary to the well established policy of Texas.

5th. And for further exception defendant says, the laws of Mexico, as plead, are so unlike and dissimilar to the laws of Texas that this Court should not undertake to administer the same under the doctrine of national or interstate comity.

Of all of which defendant prays judgment of the Court.

MEXICAN NATIONAL RAILROAD COMPANY,
By THOS. W. DODD, Attorney.

(Indorsed:) Lena M. Slater, et als., vs. Mexican National R. R. Co. Defendant's Original Answer. Filed Dec. 5th, 1900. D. H. Hart, Clerk by Geo. B. Hufford, Deputy.

ORDER ON DEMURRERS.

Lena M. Slater, et als.,
vs. No. 3.
Mexican National Railroad Company.

Now, on this day, December 4, 1900, came the parties by their attorneys, and then came on to be heard the demurrers of the defendant, filed herein on the 4th day of December, and the Court having heard the same, and the argument, and being advised as to the law, and being of the opinion that the law is with the plaintiffs, it is therefore considered, ordered and adjudged by the Court that the said demurrers be and the same are hereby overruled, to which ruling and judgment of the Court, defendant thereupon, by counsel, duly excepted, and by consent of counsel it is further ordered that this cause be and the same is hereby continued.

DEFENDANT'S FIRST AMENDED ANSWER.

Filed March 18th, 1901.

In the Circuit Court of the United States for the Western District of Texas, at Laredo.

Lena M. Slater, et als.,
vs. No. 3.
Mexican National R. R. Co.

Now comes the defendant Mexican National Railroad Company, by its counsel, and after leave of Court first had amends its original answer filed herein on December 4th, 1900, and for and in lieu of said answer makes and filed this its first amended original answer, as follows:

1st. In addition to the general and special exceptions heretofore urged to plaintiff's petition, defendant excepts to said petition, because it affirmatively appears from said petition that the said .... who sues, has a husband upon whom she is dependent for a support, and that therefore she is not entitled to recover in this suit, of which defendant prays judgment of the Court.

2nd. Defendant excepting further says that it affirmatively appears from plaintiff's petition that the right of survivors to recover damages for personal injuries resulting in death is alimony or pension, payable in installments, and is, therefore, so dissimilar from the laws of Texas and of the common law that this Court can not administer or enforce said laws and rights.

12 And of this defendant prays judgment of the Court.

MEX. NAT. R. R. CO., Deft.,
By THOS. W. DODD, Atty.

Comes defendant again, not waiving its plea to the jurisdiction, but specially urging the same, as well as its general and special exceptions, and in the event that this Court shall overrule its said plea and exceptions, denies all and singular the allegations in said petition contained and demands strict proof thereof, and of this defendant puts itself upon the country.

And for further plea in this behalf, defendant shows that this Court should not undertake to exercise its jurisdiction, if any in fact exists, which defendant denies, to adjudicate upon the laws of Mexico, set up as a basis of the damages sought to be recovered, because the laws are unlike and dissimilar to the laws of Texas, in this, that the right secured under the laws of Mexico to certain representatives of deceased persons to recover damages, to-wit: of surviving husbands, wives, mothers, fathers and children is the right of alimony or pensions, to be paid monthly and by installments, which right ceases whenever the necessity for alimony or support no longer exists, such as a change of fortune, marriage of

the surviving wife and daughters and when the boys arrive at the age of 21 years, which right and cause of action secured under the laws of Mexico is contrary to the public policy of Texas, as the laws of Texas have provided no remedy for the enforcement of such a right, and, therefore, our Courts, neither in law or in equity, have the power and authority to create a remedy for the enforcement of such a right, and of this defendant prays judgment of the Court and puts itself upon the country.

And again comes defendant and shows that the laws of Mexico as pleaded, when construed in connection with other provisions of the Mexican laws securing a right of recovery in surviving wives, mothers, fathers, husbands and children, for personal injuries resulting in death, to-wit: Arts. 211, 212, 213, 214, 217, 221 and 224 of the Civil Code of the Federal District, and of Arts. 1376 and 1377 of the Code of Civil Procedure, the laws of Mexico that govern, secures a right of alimony, or in the nature of a pension, and therefore secures a right of recovery unknown to the laws of Texas and for the enforcement of which no law of Texas or of the United States has been provided, and therefore this Court has no jurisdiction to grant the relief prayed, and of this defendant prays judgment and puts itself upon the country.

And for further answer in this behalf, defendant shows that plaintiff ought not to have and maintain their action because at the time of the accident in which William H. Slater was injured and for a long time anterior thereto, he, the said William H. Slater, was in the employ of defendant company as a brakeman, and that the injury he suffered was the direct and proximate result of his, the said William H. Slater's own negligence and carelessness in the performance of his duty as such brakeman, and of this defendant puts itself upon the country.

MEX. NAT. R. R. CO., Deft.,
By THOS. W. DODD, Atty.

13 (Indorsed:) No. 3. Lena M. Slater, et als., vs. The Mex. Nat. R. R. Co., Defts. 1st Amended Original Answer. Filed March 18, 1901. D. H. Hart, Clerk, by Geo. B. Hufford, Dy.

PLAINTIFF'S FIRST SUPPLEMENTAL PETITION.

Filed March 19th, 1901.

Lena M. Slater, et als.,
vs. No. 3.
The Mex. Nat. R. R. Co.

Now comes plaintiffs by leave of Court and files this their first

supplemental petition in replication to the first amended original answer of defendant, filed on March 18th, 1901, and demurs to the matters and things therein pleaded because the same constitute no denfense to the cause of action.

And especially because the laws referred to relating to alimony and pension, viz: articles of the Civil Code mentioned, are provisions of the laws of Mexico regulating matters growing out of the marriage relation, involving the duties and obligations of parties to the marriage contract and of parents and children; and such provisions do not show a material or substantive difference, or any difference between the laws of Texas, of the United States and Mexico, as to the nature of the right of action claimed by plaintiffs to exist under the laws of Mexico; nor do such provisions show or tend to show that the laws of Mexico on the subject of damages for injuries resulting in death are contrary to the public policy of Texas or of the United States.

And further excepting specially, because the provisions of the laws referred to, viz: Arts. 1376 and 1377, Code of Procedure, relate to a proceeding for the purpose of obtaining a decree for temporary alimony and in no sense can they be the foundation for a defense to the action.

And of this defendant (plaintiff) prays judgment of the Court.

KELLER & WILLIAMS, and E. A. ATLEE,
Attorneys for Plaintiffs.

And in aid of the foregoing exceptions plaintiffs file herewith as Exhibits "A" and "B" and made a part hereof, the following:

A translation of chapter IV of Book 1, title V of the Civil Code of Mexico, which treats of alimony (de los Alimentos), which chapter includes the articles mentioned in said amended answer.

Also a translation of certain articles of chapter 11, of book 111, title 1, of Mexico Code of Procedure, relating to temporary alimony, including the articles mentioned in said amended answer.

KELLER & WILLIAMS and E. A. ATLEE,
Attorneys for Plaintiffs.

(Indorsed:) No. 3. Lena M. Slater, et als., vs. The Mex. Nat. R. R. Co. Plaintiff's 1st Sup. Petition. U. S. Ct. Ct., W. Div. of Texas, at Laredo. Filed March 19, 1901. D. H. Hart, Clerk, by Geo. B. Hufford, Dy.

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14 EXHIBIT "A," FILED WITH PLAINTIFF'S FIRST SUPPLEMENTAL PETITION.

Chapter IV, of Book I, Title V—Concerning Alimony.

Art. 205. The obligation to furnish alimony is reciprocal, the

one who furnishes alimony has in his turn the right to demand it.

Art. 206. Parties to the marriage contract, in addition to the general obligation which the marriages imposes, are bound for alimony in cases of divorce and in other cases provided by law.

Art. 207. Parents are bound to give alimony to their children. If there be no parents or they be not able to give alimony, the obligation falls on the other relations on both sides in the nearest ascending grade.

Art. 208. Children are bound to give alimony to their parents. If there be no children, or if they are not able to give alimony, the nearest relations in the descending grade are bound.

Art. 209. If there be no relations in the ascending or descending grade, or if they are not able to give alimony, the obligation falls on the brothers and sisters of both parents; on those of the mother alone, if there be none of the father, and on those of the father if there be none of the mother.

Art. 210. Brothers and sisters are bound to give alimony to their younger brothers and sisters only until they are 18 years of age.

Art. 211. Alimony comprehends food, clothing, dwelling place and attendance in sickness.

Art. 212. Respecting minors, alimony includes in addition, the expenses necessary for the primary education of the dependent, and to prepare him for some occupation, art or profession, honest and suitable to his sex and personal circumstances.

Art. 215. The one bound to supply alimony fulfills his obligation by assigning a pension sufficient to support the dependent, or by taking him into his family.

Art. 214. Alimony should be in proportion to the estate of the one bound, and to the necessities of the one who receives it.

Art. 215. If the obligations to receive alimony falls upon several, and all are able to give, the judge shall apportion the amount among them according to their means.

Art. 216. If only some of these are able, the amount of alimony shall be apportioned among them; and if one only shall have the means he alone shall comply with the obligation.

Art. 217. The obligation of supplying alimony does not include that of endowing the children, nor that of providing them with capital to prosecute the business, are [art] or profession for which they may have been fitted.

Art. 218. The right to demand that alimony be made secure exists in favor of: I. The person entitled to alimony. II. The relative in ascending grade who may have him (the person entitled thereto) under his parental control: III. The guardian. IV. The brothers and sisters. V. The public department.

Art. 219. If the person who demands security of alimony in the name of the minor, cannot and does not wish to represent him in Court, the Judge shall appoint a temporary guardian.

Art. 22 [220.] The security may consist of a mortgage, bond or deposit of an amount sufficient to cover the alimony.

Art. 221. The temporary guardian shall give security for the annual value of the alimony. If he should control any fund designated for that purpose he must give legal security for it.

Art. 222. Where the father enjoys the use of the property of the child, the value of the alimony shall be deducted from it (the income) if it is sufficient to cover it (the alimony). On the contrary, where the income is not sufficient the difference shall be (a charge) on account of the father.

Art. 223. If the necessity of the dependent proceeds from bad conduct the Judge, having knowledge of the cause, may diminish the sum fixed as alimony, placing the one at fault, if necessary, under care of competent authority.

Art. 224. The obligation to supply alimony ceases: I. When the one bound lacks the means of compliance. II. When the dependant is no longer in need of alimony.

Art. 225. The right to receive alimony cannot be renounced, nor can it be subject to compromise between the parties.

(Indorsed:) No. 3. Lena M. Slater, et als., vs. the Mex. Nat. R. R. Co. Exhibit "A." Filed with plaintiff's 1st Sup. Petition. Filed March 19, 1901. D. H. Hart, Clerk, by Geo. B. Hufford, Dy.

EXHIBIT "B."

Filed with Plffs.' First Sup. Petition.

Filed March 19, 1901.

Chapter 11, of Book 111, Title 1.

Civil Procedure. Temporary Alimony.

Art. 1372. In order to decree temporary alimony to one who has the right to exact it, it is necessary:

I. To make complete proof of the right under which it is asked.

II. To prove proximately at least, the means of the one who should give alimony.

III. To make sufficient proof of the urgent necessity for temporary alimony.

Art. 1373. The proof required under paragraph 1 of the preceding article shall be the last will, the contract or executory instrument which contains the obligation to give alimony; the contract will have to be in form of a public writing.

Art. 1374. When alimony is asked on the ground of consanguinity, the documents should be presented which prove the interested party to be within the cases provided in article 207 to 210 and 3324 and articles of the civil code relating thereto.

Art. 1375. When husband or wife asks alimony, the act or certificate of marriage must be presented.

Art. 1376. After compliance with the provisions of the preceding articles, the Judge, if he believes the right has been established, shall designate the amount of alimony and shall adjudge it, directing it to be secured months in advance
16 in all cases.

Art 1377. Immediately on adjudging temporary alimony, the first monthly payment shall be exacted of the one liable for it.

(Indorsed:) No. 3. Lena M. Slater, et als., vs. the Mex. Nat. R. R. Co. Exhibit "B." Filed with Plffs.' 1st Sup. Petition. Filed March 19th, 1901. D. H. Hart, Clerk, by Geo. B. Hufford, Dy.

AGREEMENT OF COUNSEL AS TO TRANSLATIONS OF LAWS OF MEXICO.

In the Circuit Court of the United States, in and for the Western District of Texas, at Laredo, Texas.

Lena M. Slater, et als.,
vs. No. 3.
The Mexican National Railroad Company.

This day this cause came on to be heard and the following proceedings were had:

Present: The Honorable T. S. Maxey, Judge of said Court.
Mr. M. Williams, Mr. E. A. Atlee, Counsel for Plaintiffs.
Mr. T. W. Dodd, Counsel for Defendant.

It is agreed by counsel upon both sides that the translation of the laws of Mexico, as set up in plaintiff's petition, and which translations are herewith filed and marked Exhibit "A" and "B" for identification with the records in this case, are correct translations of the laws they purport to be translations of, taken from the respective codes in said petition mentioned.

And it is further agreed that the laws described in defendant's original answer and plaintiff's supplemental petition are the laws of Mexico having application to this case.

ORDER OF DEMURRERS.

Deft's. Second Demurrer to Pltffs.' Petition.

Pltffs.' Exception to Deft's. Am'd Answer.

Lena M. Slater, et als.,
vs. No. 3.
The Mexican National Railroad Company.

In the above styled cause on the 29th day of March, 1901, came on to be heard the demurrers of both parties, and defendant having withdrawn its first demurrer contained in its first amended original answer, and the Court having heard the second demurrer contained therein, is of the opinion that the same should be and it is hereby overruled. And the Court having considered the demurrers of plaintiffs contained in their first supplemental petition is of the opinion that all of said demurrers should be and they are hereby sustained. To which ruling of the Court both in sustaining plaintiff's demurrers and in overruling defendant's demurrers, the defendant in open Court duly excepted.

17

FINAL JUDGMENT.

Lena M. Slater, William F. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater,
vs. No. 3.
The Mexican National Railroad Company.

Now on this 20th day of March, A. D. 1901, this cause coming on to be called for trial, came the parties by their attorneys, and announced ready for trial; whereupon came a jury of good and lawful men, to-wit: P. J. McMahon, and eleven others, who being duly tried, empaneled and sworn, and having heard the pleadings read, the evidence adduced and the argument of counsel, and having received the charge of the Court, on the 21st day of March, A. D. 1901, retired to consider their verdict; and afterwards on the same day returned into open Court the following verdict, to-wit:

Lena M. Slater, et als., vs. Mex. Natl. R. R. No. 3.

We, the jury, find in favor of the plaintiffs, and assess their damages at seven ($7,000) thousand dollars. Of the amount of damages so found we award to the plaintiff, Lena M. Slater, the sum of $2,691.00; to the plaintiff, William F. Slater, $453.00; to plaintiff, Jesse R. Slater, $717.00; to plaintiff, Annie E. Slater, $1,346.00; to plaintiff, Henry G. Slater, $1,793.00.

(Signed) P. J. McMAHON, Foreman."

Wherefore, it is considered, ordered, adjudged and decreed by the Court that the plaintiffs do have and recover of and from the defenant, the Mexican National Railroad Company, the full sum of seven thousand dollars, with interest thereon from this date at the rate of six (6) per cent per annum.

It is further ordered, adjudged and decreed by the Court that of the said sum of seven thousand dollars, the plaintiff, Lena M. Slater, do have and recover the sum of two thousand six hundred and ninety-two dollars ($2,692.00); the plaintiff, William F. Slater, the sum of four hundred and fifty-three dollars ($453.00); the plaintiff, Jesse R. Slater, the sum of seven hundred and seventeen dollars ($717.00); the plaintiff Annie E. Slater, one thousand three hundred and forty-six dollars ($1,346), and the plaintiff, Henry G. Slater, one thousand seven hundred and ninety-three dollars ($1,793.00), with interest on the said sums respectively from this day at the rate of six (6) per cent per annum.

It is further ordered and adjudged that the plaintiffs do have and recover their costs in this behalf expended for all of which, judgment and costs let execution issue.

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18 EXTENSION OF TIME TO FILE BILLS OF EXCEPTIONS.

Lena M. Slater, et als.,
vs. No. 3.
The Mexican National Railroad Company.

Upon application of the defendant in the above entitled and numbered cause, it is ordered by the Court that the defendant have thirty days from this date within which to file its bills of exceptions.

BILL OF EXCEPTIONS NO. 1.

Filed Dec. 7th, 1900.

In the Circuit Court of the United States for the Western District of Texas, Laredo Division.

Lena M. Slater, et als., Plaintiffs,
vs. Suit at Law.
Mexican National Railroad Company, Defendant.

Be it remembered, that the above entitled and numbered cause came on to be heard on the 4th day of December, A. D. 1900; it being the second day of the December term, A. D. 1900, of the

United States Circuit Court in and for the Western District of Texas, at Laredo; whereupon both parties appeared by counsel and announced ready upon the questions of law arising upon the demurrers, general and special, of the defendant, Mexican National Railroad Company, to plaintiffs' petition filed herein on the 17th day of November, A. D. 1900, which petition is in words as follows:

In the Circuit Court of the United States for the Western District of Texas, at the City of Laredo.

Lena M. Slater, et als., Plaintiffs,
vs. No. 3.
Mexican National Railroad Company, Defendant.
Suit at Law.

To the Honorable Judges of said Court:

Now come Lena M. Slater and William F. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater, minors, joined herein and represented by their next friend, Lena M. Slater, hereinafter styled plaintiffs, and complaining of the Mexican National Railroad Company, hereinafter styled defendant, respectfully represents unto the Court:

I. That plaintiffs are citizens of and reside in the County of Webb, and State of Texas, and the defendant is a private corporation, chartered, organized and existing under and by virtue of the laws of the State of Colorado, and that it is a citizen of the State of Colorado, and that it owns and operates and at all times hereinafter mentioned, has owned and operated a line of railway from the City of Laredo, Webb County, Texas, to the City of Mexico, in the Republic of Mexico, carrying on and conducting the ordinary business of a railway company as a common carrier of passengers and merchandise for hire; and that J. N. Galbraith, who re-
19 sides in Webb County, Texas, is its superintendent and local agent in Webb County, Texas, upon whom service of citation may be had.

II. That plaintiff, Lena M. Slater, is the surviving wife of William H. Slater, deceased, and that William F. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater, are the minor children of the plaintiff Lena M. Slater, and the said William H. Slater, deceased.

III. That therefore, to-wit: On or about the 20th day of May, A. D. 1900, and for a long time prior thereto, William H. Slater, deceased, was an employ of the said defendant and in the employ of the said defendant as a switchman or brakeman, and on said date was engaged in his usual and customary duties as such switchman in the City of Nueva Laredo, Republic of Mexico, in the yards of the defendant company at said place.

IV. That at the said time and place and while so employed in

the service of defendant, and in the discharge of his duties incident to said employment, the said William H. Slater deceased, went in between two freight cars belonging to defendant to make a coupling, and while so employed in the service of defendant, and acting under the direction of the said company, by and through the negligence of the said company, its agent, servant and employes, he was mashed, bruised and injured so that on the following day, in the City of Laredo, Texas, he died of said injuries. That the said injuries which caused the death of the said William H. Slater were caused wholly through the fault and negligence of defendant, and without any fault or contributory negligence on part of said deceased, or any of these plaintiffs.

V. That at the time that the said injuries occurred the said William H. Slater was acting under the direction and control of defendant's yardmaster at said Nueva Laredo, and was in the discharge of the duties assigned to him: That the cars which the said Slater was attempting to couple when he received said injuries, were flat cars; that the drawhead of one of said cars was higher than the drawhead of the other car, and the centers on said drawheads were not opposite, but on the contrary the respective heights of said drawheads were so unequal that when said two cars came together one of said drawheads could pass over the other, and when the said William H. Slater went in between the cars to make the coupling, one of which was standing still and the other was being moved by an engine, the high drawhead passed above and on top of the low drawhead and permitted the ends of the two cars to come together and mash and injure the said William H. Slater so that he died as aforesaid.

VI. That it was the duty of the defendant to furnish safe and suitable appliances, machinery and cars for the said William H. Slater to work with and about and it was its duty carefully to inspect said cars and at all times see that the same were reasonably safe and free from defects; that the defendant failed so to furnish safe and suitable cars and appliances and wholly failed to inspect the same and to see that the said cars were reasonably safe for the use of the sid Slater, but defendant negligently, carelessly and wrongfully failed to inspect said cars, and failed to have them in a safe and suitable condition; that the said defendant, its agents, servants and employes knew, or by the exercise of ordinary care could have known of the defect of said cars, and could and should have known that the said drawheads were not of the same height; that by reason of the negligence and carelessness of defendant the said William H. Slater was injured and killed as aforesaid.

VII. That Lena M. Slater is about forty years of age, and that William F. Slater is about fourteen years of age, Jesse R. Slater, twelve years of age, Annie E. Slater six years of age and Henry C. Slater six months of age. That William H. Slater at the time of his death was forty-three years of age and was an experienced

brakeman; he was in good health, was strong, frugal and industrious and during his lifetime had performed and was capable of performing, a great deal of labor. He was a man of good moral character, and was sober and industrious and at the time of his death was earning about the sum of one hundred and twenty-five ($125.00) per month. That he was kind and indulgent to his wife and children and during his married [life] he gave practically all his earnings aforesaid to their support and maintenance.

VIII. Decedant's expectancy of life according to standard tables of mortality, was about thirty-five years and plaintiffs during their lives reasonably expected to receive and in fact would have received in money from the earnings of deceased thirty thousand dollars ($30,000.00); that plaintiffs were each dependant for their support and maintenance upon the earnings of deceased, upon which fact and other considerations particularly the legal obligations of the deceased to support them, and the love and affection for them, they base their expectations of pecuniary aid from said deceased.

The said plaintiffs by reason of said negligent killing of said William H. Slater in the way and manner aforesaid have sustained actual damages in the sum of thirty thousand dollars ($30,000.00) for all of which by reason of the premises, the defendant corporation has become liable.

IX. Plaintiffs further allege that by the laws of Mexico which now exist and existed and were in force at the time and place of the happening of the killing of William H. Slater, through the defendant's negligence as aforesaid, they, the plaintiffs, have and had the right of action against the defendant for their damage, and they say that the following were the laws of Mexico, applicable to this case, out of which said right of action grew, and by virtue of which the same now exists in the said Republic of Mexico, to-wit:

From the Federal Constitution of the Mexican United States.

"Art. 72. Congress has power * * * (22) To enact laws governing the general lines of communication, and governing post-offices and mails."

"Art. 97. The Federal Courts have jurisdiction: (1) Of all questions growing out of the execution and application of the Federal Laws, except when the application of the law only affects interests of individuals, in which case the local Judges and Tribunals of the State shall entertain jurisdiction."

21 From the Penal Code of Mexico.

"Art. 4. A crime is a voluntary infraction of a penal law, doing that which it prohibits, or neglecting to do that which it commands.

"Art. 5. A misdemeanor is the infraction of police regulations or proclamations and good government.

"Art. 6. There are intentional crimes, and crimes resulting from neglect.

"Art. 11. Negligent crimes exist: (1) Where an act is done, or a duty omitted, which, although lawful in itself, is not so by reason of its consequences, if the accused fails to provide against the consequences, through negligence, want of reflection or care, by not making proper investigations, by not taking necessary precautions or through unskillfulness in any art or science, the knowledge of which is necessary in order that the act done may not result in injury. Unskillfulness is not punishable when he who does the act does not profess the art or science necessary to be known, and acts when impelled by the gravity and urgency of the case. * * * (3) Where the question relates to an act which is punishable solely by reason of the circumstances under which it is done, or by reason of a circumstance personal to the party aggrieved; if the accused is ignorant of such circumstance, through not having previously made the investigation which the duty of his profession or the importance of his case demands."

Pen. Code Bk. 2. "Civil Liability in Criminal Matters."

"Art. 301. The civil liability arising from an act or omission contrary to the penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses."

"Art. 304. Reparation comprehends: Payment of all damages caused to the injured party, to his family or a third person for the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, a proximate, inevitable consequence."

"Art. 305. Indemnization imports: The payment of damages, that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an act of omission by which a formal, existing and not merely possible right is attacked, and of the value of the fruits of the thing usurped and already consumed, in the case in which the same should be done conformably with civil right."

"Art. 306. The condition required by the two preceding articles, that the damages and injuries should be actual, shall not prevent that the indemnization of subsequent damages and injuries be exacted by a new suit, when they shall have accrued; if they proceed directly from, and as a necessary consequence of, the same act or omission from which resulted the previous damages or injuries."

"Art. 307. The payment of judicial expenses solely embraces those absolutely necessary, which the injured party incurs for the purpose of investigating the act or omission which causes the crim-

inal proceeding and to avail himself of his rights in such proceedings or in the civil suit.

"Art. 308. The civil responsibility can not be declared except at the instance of the party entitled to recover."

22 "Art. 309. The Judges who adjudicate upon the civil responsibility shall be controlled by the provisions of this title, in so far as its provisions extend; on other questions, they shall follow, according to the nature of the suit, the provisions of the civil or of the commercial laws which may be in effect at the time of the happening of the act or omission causing the civil responsibility."

"Art. 310. The right to civil responsibility form part of the estate of the decedant and descends to his heirs and successors, provided it be not the case of the following article, or that it arise from injury or defamation, and that, the offending person having been able in the life-time to bring his suit, he neither did so nor directed his heirs to sue; in such case the offense shall be understood as remitted.

"Art. 311. The action to enforce civil responsibility demanding support of a person guilty of homicide is personal, and belong exclusively to the persons named at the end of article 318 as directly damaged. Consequently such action forms no part of the estate of the deceased, nor is it extinguished, although the latter pardon the offense in life."

"Art. 318. The civil responsibility that grows out of a homicide done without right (or justification) comprehends the payment of the indispensible expenses of the burial of the body, the expenses and necessary charges made for the cure of the deceased, the damages which the homicide cause to the property of the deceased, and of the support not only of the widow, descendants and ascendants of the deceased, who were being supported by him, he being under the legal obligations to do so, but also to the posthumous descendants that he may leave."

"Art. 319. The obligation to furnish said support shall last during all the time that the deceased might have lived if the homicide had not killed him, and that time shall be calculated by the Judges according to the table at the end of this chapter, but taking into consideration the state of health of the deceased before the homicide was committed. As a limitation to this rule obligation to give support shall cease. 1. At whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it. 2. When ever those beneficiaries get married. 3. When the minor children become of age. 4. In any other case in which, according to law, the deceased, if alive, would not be required to continue the support."

"Art. 320. In order to fix the amount which should be given as the measure of support, the ability of the party responsible for the killing shall be taken into consideration and the necessities and circumstances of the persons entitled to receive it."

"Art. 325. * * * Table of mortality or expectancy of life.

A	10.....	Corresponded	.....40.80
"	15.....	"	.....37.40
"	20.....	"	.....34.26
"	25.....	"	.....31.34
"	30.....	"	.....28.52
"	35.....	"	.....25.72
"	40.....	"	.....22.89
"	45.....	"	.....20.05
"	50.....	"	.....17.23
"	55.....	"	.....14.51
"	60.....	"	.....11.05
"	65.....	"	.....09.63
"	70.....	"	.....07.58
"	75.....	"	.....05.87
"	80.....	"	.....04.60
"	85.....	"	.....02.00

23 Federal Civil Code, Chap. IV.

"Art. 205. The obligation to give support is reciprocal; he that gives support has at the same time the right to ask it."

"Art. 206. Married people in addition to the general obligation imposed by matrimony, have that of giving support in cases of divorce and others designated by law."

"Art. 207. Fathers are obliged to support their children. If it should be impossible for parents to do so, or they should be unable to do so, the obligation falls upon the other descendants by both lines of ascendancy who are nearest of kin.

"Art. 208. The children are obliged to give support to their parents. If it is impossible for the children to do so, then those descendants next of kin are obliged to do so.

"Art. 211. The support comprehends eating, dress, habitation and assistance in case of sickness."

"Art. 212. In regard to minors support it comprehends in addition the necessary expenses for the primary education of the party entitled to support, and to furnish him some calling, art or profession, honest and adequate to his sex and personal circumstances."

"Art. 214. The support should be proportioned according to the abilities of those who have to give it, and the necessities of those who have to receive it."

"Art. 220. The assurance of the support may consist in a mortgage, bond or deposit of sufficient amount to cover the support."

"Art. 225. The right to receive support can not be renounced nor is it an object of transfer or assignment."

Pen. Code Bk. 2.

"Art. 313. The Judges who take cognizance of suits based upon civil responsibility shall endeavor that the amount and terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following article shall be observed: * * * *

"Art. 321. In cases of blows or wounds, from which the injured party does not remain crippled, lamed or deformed, he shall have the right that the responsible party pay all his expenses of cure, the damage he may have suffered, and that which he may fail to gain during the time which, in the opinion of competent
24 persons, he may not be able to do the work by which he subsists. But it is essential that the inability to work should be the direct result of the wounds or blows, or be a cause which is the immediate effect of such blows or wounds."

"Art. 322. If the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which he shall recover, and can devote himself to other and different work, which may be lucrative and appropriate to his education, habits, social position and physical constitution, the civil responsibility shall be reduced to paying him the sum which his liability to earn in his new employment falls short of his daily earnings in his former occupation."

"Art. 323. If the blows or wounds cause the loss of any member not indispensible for work, or the person wounded or struck remain otherwise crippled, lame or deformed, by that circumstance he shall have the right not only to the damages and injuries, but also to the sum which the Judge may determine as extraordinary indemnity, considering the social position and sex of the person and the part of the body remaining crippled, lamed or deformed."

"Art. 324. The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability."

"Art. 325. The provisions of the foregoing articles for computing the civil responsibility for wounds shall be applied to all other cases where, in the violation of a penal law, a person may cause the illness of another, or may have placed him under disability to work."

"Art. 326. No person shall be charged upon a civil liability upon an act or omission contrary to a penal law unless it be proven; that the party sought to be charged usurped the property of another; that without right he caused, by himself or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority."

"Art. 327. Whenever any of the conditions of the preceding articles are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability."

"Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 326 and 327, it is an indispensable condition that the act or omissions of the clerks or servants causing the liability shall occur in the service for which they were employed."

"Art. 331. Under the conditions of the preceding article, those liable are * * * * railroad companies."

"Art. 363. Limitation: The various actions by which civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked shall be extinguished according to the terms and in the manner provided in the civil code of the commercial code, according to the nature of the demand and the subject-matter treated of."

"Art. 364. Amnesty shall not extinguish the civil responsibility, nor the actions to exact it, nor the legal rights which
25 third persons may have acquired. Nevertheless when the responsibility may not yet have been made effective, and the demand is not for restitution, but for reparation of damages, of indemnity for injuries, or for the payment of judicial expenses, the guilty person shall remain free from such obligations only when it is so declared in the amnesty and they are expressly left to the charge of the public treasury."

"Art 365. A pardon shall in no case extinguish civil responsibility nor the actions to enforce it, nor the legal rights which third persons may have acquired."

"Art. 366. Limitation is interrupted by criminal proceeding until final judgment is pronounced. This done the term of limitation commences to run anew."

Transitory Law: Pen. Code.

"Art. 26. Until it is determined in the new code of procedure what Judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following shall be observed: * * * * (5) Actions to enforce the civil liability may be brought before Court of civil jurisdiction, whether or not the criminal proceedings has been commenced; but while the latter is pending the proceedings in the former shall be stayed."

From the Federal Civil Code.

"Art. 9. Against the observance of the law, disuse custom or practice to the contrary cannot be alleged."

"Art. 20. When a judicial controversy can be decided neither by the text nor by the natural meaning or spirit, of the law, it must be decided according to the general principles of right, taking into consideration all the circumstances of the case."

"Art. 21. In cases of conflict of rights and the absence of ex-

press law for the special case, the controversy shall be decided in favor of him who seeks to avoid damages, and not in favor him who seeks to obtain a profit. If the conflict should be between equal rights, or rights of the same species, it shall be decided by observing the greatest equality possible between the parties."

"Art. 1095. Limitation bars in three years * * * * (8) Civil responsibility for injuries, whether done by word or by writing, and that which arises from damage caused by persons or animals, and which the law imposes upon the representatives of such persons or the owners of the animals."

Act of Congress of December 15, 1881.

"Art. 1. The executive shall regulate the service of railroads, telegraphs and telephones constructed, or which may in the future may be constructed, upon Mexican territory, according to the following basis: (1) Railroads, telegraphs and telephones which in the Federal District and territory of Lower California unite together two or more municipalities, or the Federal District and territory of Lower California with one or more states; those which communicate two or more states with each other; those which touch at any point in the territorial boundary line of the republic and foreign countries, or run parallel therewith within a region of twenty leagues, are known as general lines of communication within the meaning of fraction 22 of article 72 of the constitution. (2) The general lines of communication and their branches shall be subject exclusively to federal legislature, executive and judicial powers, in their respective spheres, in all cases where any of the following matters are involved: * * * * (g) The construction and repair of works. Crimes committed against the security or integrity of works or against the operation of lines. (h) Security of the same works for which the companies, through delays or obstructions, carelessness or fault in the service and for accidents or mishaps in the operation."

From the Regulations for the Construction, Maintenance and Operation of Railroads.

"Art. 52. The coaches and cars which enter into the make-up of a train shall have draw-heads of the same height, so that their centers shall be opposite to each other."

"Art. 53. No car of whatever kind shall form a part of the make-up of a train, unless the same shall have previously been inspected very carefully."

"Art. 99. The company shall be responsible for the moving of all trains on its road."

"Art. 184. Companies (railroad) are liable for all faults or accidents which occur through tardiness, negligence, imprudence or want of capacity of their employes."

"Art. 208. All violations of this law which companies (railroad) commit shall be subject to punishment by the administration of a fine up to five hundred dollars, which the department of public works shall assess, reserving always the right of individuals through indemnity and the liabilities which the companies may have incurred through criminal acts or omissions committed by them."

Plaintiffs furtner allege that by reason of the general statutes of the State of Texas and by virtue of the general principles of right and justice and of the laws of Mexico hereinbefore mentioned, they had and now have a right of action for their damages against the defendant in the Republic of Mexico, and the same now exists in said country as well as in the State of Texas and in the United States of America. And they say that the acts of negligence upon the part of the defendant, its agents, servants and employes were wrongful and actionable as hereinbefore shown by plaintiffs in Republic of Mexico at the time of the killing complained of and are now so, and they say that the same were then and are now wrongful and actionable in the United States of America, and in the State of Texas. And plaintiffs say that by reason of the negligent killing of the said William H. Slater, they have suffered damages in the sum of thirty thousand dollars ($30,000.00).

Wherefore, premises considered, plaintiffs pray that defendant be cited to answer this petition and that they have judgment for their said damages and that said damages be apportioned among the plaintiffs as they may be found to share therein, and that they have judgment for all costs of suit and for general and special relief.

KELLER & WILLIAMS,
Attorneys for Plaintiffs.

27 The said demurrers being as follows:

In the U. S. Circuit Court for the Western District of Texas, at Laredo.

Lena M. Slater, et als., Plaintiffs,
vs. No. 3.
The Mexican National Railroad Company, Defendant.

Now comes defendant and says that the allegations in plaintiff's petition are wholly insufficient to require further answer of this defendant, and of this it prays judgment of the Court.

1st. And specially excepting defendant says that it affirmatively appears from the petition of the plaintiff that the wrongs charged to have resulted in the death of William H. Slater occurred in the Republic of Mexico and not within the jurisdiction of this Court.

2nd. That it affirmatively appears from the allegations of said petition that the laws of Mexico, where the wrong is alleged to have occurred, and not similar or analogous to the laws of Texas, but that the same are dissimilar and different from the laws of Texas,

in this: that under the laws of Mexico, plead by plaintiffs in said petition, the parties entitled to institute and maintain suits for wrongs resulting in death, are not the same as in Texas; and in this: that they are dissimilar in many other respects made obvious by an examination of the laws of Mexico plead by plaintiffs; and in this: that under the laws of Texas it is provided in order to authorize a recovery for the death of another by wrongful act, negligence, carelessness, unskillfulness or default causing the death of another must be of such a character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury; whereas there appears no such limitation upon the survivor under the laws of Mexico, upon the contrary it appears that a cause of action in favor of a certain named person would exist notwithstanding the injured person during life had extinguished said cause of action; and in this: that under the laws of Texas in like cases the recovery would be "in solidum," while under the Mexican laws plead such recovery is not intended or contemplated, but must be in instalments not to exceed the amount contributed by deceased during life in support of the beneficiaries or persons entitled to be supported by deceased.

3rd. And specially excepting further, plaintiff's petition affirmatively shows that plaintiff's right to recover damages in Mexico, if any, depends wholly upon an infraction of a penal statute of the Republic of Mexico; that to authorize a recovery under the laws of Mexico this Court must find the act or omission charged to be a violation of the penal code of Mexico, portions of which it set up in plaintiff's petition; that said laws have no extra territorial effect, and this Court has no jurisdiction to determine such matters, or to adjudge damages based upon a penal statute of a foreign government.

4th. And for further exception it does not appear that said cause of action is by all parties authorized under Mexican laws to maintain an action for recovery of damages, nor does it appear for the use of all persons that might be entitled to recover damages for the wrongful killing of another, but is for the sole use of the
28 wife and children, not negativing the existence of other entitled to recover under the Mexican laws and is, therefore, not authorized by the Texas statutes, but is in direct violation thereof, and if entertained would subject defendant to a multiplicity of suits contrary to the well established public policy of Texas.

5th. And for further exception defendant says that laws of Mexico, as plead are so unlike and dissimilar to the laws of Texas that this Court should not undertake to administer same under the doctrine of national or interstate comity.

Of all of which defendant prays judgment of the Court.

Which demurrers, both general and special, the Court overruled, to which order and judgment defendant, the Mexican National Railroad Company, by counsel then and there excepted, and here

now tenders this bill of exceptions, and prays the Court that the same be allowed and approved and ordered filed with the papers in said cause as a part of the record thereof, which is accordingly done.

T. S. MAXEY,
Judge.

Signed Dec. 7, 1900.

(Indorsed:) No. 3. Lena M. Slater, et als., vs. Mexican National Railroad Company. Bill of exceptions No. 1. Filed December 7, 1900. D. H. Hart, Clerk.

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29 BILL OF EXCEPTIONS NO. 2.

Filed Mar. 22, 1901.

In the United States Circuit Court, Western District of Texas, at Laredo.

Lena M. Slater, et als., Plaintiffs,
vs. No. 3.
Mexican National Railroad Company, Defendant.

Bill of Exceptions No. 2.

Be it remembered that the above entitled and numbered cause came on to be heard on the 20th day of March, A. D. 1901, it being the third day of the March Term, A. D. 1901, of the United States Circuit Court in and for the Western District of Texas, at Laredo.

Whereupon both parties appeared by counsel and announced ready upon the questions of law arising upon the special demurrers of the defendant, the Mexican National Railroad Company, to plaintiff's petition filed herein, on the 17th day of November, A. D. 1901, which petition is set out in hec verba in defendant's Bill of Exceptions No. 1, allowed and signed by T. S. Maxey, Judge presiding, on the 7th day of December, A. D. 1901, which was filed in said cause on the 7th day of December, A. D. 1901, which petition so copied in said Bill of Exceptions No. 1, is hereto made a part of this bill, to which defendant urged the following exceptions which was filed on March 18th, A. D. 1901, which is as follows, to-wit:

Defendant excepting, further says: that it affirmatively appears from plaintiff's petition that the right of survivors to recover damages for personal injuries resulting in death is alimony or pension, payable in installments, and is therefore so dissimilar from the laws of Texas, and of the common law, that this Court cannot administer or enforce said laws and rights and of this defendant prays judgment of the Court. Which exception, the Court after hearing argument of counsel, overruled; to which ruling defendant by its

counsel then and there in open court excepted and here now tenders this its bill of exceptions No. 2 and prays that the same be approved and ordered filed as a part of the record in this cause, which is accordingly approved, allowed and ordered filed as a part of the record and proceedings in said cause.

March 22, 1901. T. S. MAXEY, Judge.

(Endorsed:) No. 3. Lena M. Slater, et als. vs. Mexican National Railroad Company. In the United States Circuit Court, Western District of Texas, at Laredo. Bill of Exceptions No. 2. Filed this 22nd day of March, 1901. D. H. Hart, Clerk, by Geo. B. Hufford, Deputy.

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30 DEFT'S BILL OF EXCEPTIONS NO 3.

Filed Mar. 28, 1901.

In the United States Circuit Court, Western District of Texas, at Laredo.

Lena M. Slater, et als., Plaintiffs,
vs. No. 3.
Mexican National Railroad Company, Defendant.

Bill of Exceptions No. 3.

Be it remembered that the above entitled and numbered cause came on to be heard on the 20th day of March, 1901, it being the third day of the March Term, A. D. 1901, of the United States Circuit Court in and for the Western District of Texas, at Laredo.

Whereupon both parties appeared by counsel and announced ready upon questions of law arising upon special demurrers of plaintiffs to defendants' First Amended Original Answer filed herein on the 18th day of March, A. D. 1901, or as much thereof as reads as follows, to-wit:

"And further plea in this behalf defendant shows that this Court should not undertake to exercise jurisdiction, if any in fact exists which defendant denies, to adjudicate upon the laws of Mexico set up as a basis of damages sought to be recovered, because said laws are unlike and dissimilar to the laws of Texas, in this, that the right secured under the laws of Mexico, to certain representatives of deceased persons to recover damages, to-wit: of surviving husbands, wives, mothers, fathers and children is the right of alimony or pension to be paid monthly and in installments, which right ceases whenever the necessity for alimony or support no longer exists, such as change of fortune, marriage of the surviving wife and daughters, and when the boys arrive at the age of twenty-one years; which right and cause of action secured under the laws of Mexico,

is contrary to the public policy of Texas, in that the laws of Texas have provided no remedy for the enforcement of such a right; and therefore our courts, neither in law nor equity have the power and authority to create a remedy for the enforcement of such a right. And of this defendant prays judgment of the Court and puts itself upon the country.

And again comes defendant and shows that the laws of Mexico as pleaded, when construed in connection with other provisions of the Mexican laws, securing a right of recovery to surviving wives, mothers, fathers, husbands and children for personal injuries resulting in death, to-wit:

"Art. 212, 213, 214, 217, 221 and 224 of the Civil Code of the Federal District and Arts. 1376 and 1377 of the Code of Civil Procedure, the laws of Mexico that govern secure a right of alimony or in the nature of a pension and therefore secures a right of recovery unknown to the laws of Texas, and for the enforcement of which no law of Texas or of the United States has been provided, and therefore this Court has no jurisdiction to grant the relief prayed. And of this defendant prays judgment and puts itself upon the country."

To which plaintiffs urge the following demurrer by way of its First Supplemental Petition, to-wit:

31 And especially because the laws referred to relating to alimony and pension, viz: Arts. of Civil Code mentioned, are the provisions of the law of Mexico regulating matters growing out of the marriage relation, involving the duties and obligations of parties to the marriage contract, and of parents and children; and such provisions do not show a material or substantive difference, or any differences between the laws of Texas, or the laws of the United States and Mexico, as the nature of the right of action claimed by plaintiffs to exist under the laws of Mexico. Nor do such provisions show or tend to show that the laws of Mexico on the subject of damages for injuries resulting in death are contrary to the public policy of Texas, or of the United States.

And further excepting, especially, because the provisions of the law referred to, viz: Arts. 1376 and 1377 Code of Procedure relate to a proceeding for the purpose of obtaining a decree of temporary alimony and in no sense can they be the foundation for a defense to the action. Said laws so pleaded by the defendant read as follows, to-wit:

"Art. 211. Alimony comprehends food, clothing, dwelling place, and attendance in sickness."

"Art. 212. Respecting minors, alimony includes in addition the expenses necessary for the primary education of the defendant, and to prepare him for some occupation, art or profession, honest and suitable to his sex and personal circumstances."

"Art. 213. The one bound to supply alimony fulfills his obligations by assigning a pension sufficient to support the defendant, or by taking him into his family."

"Art. [214]. Alimony should be in proportion to the estate of the one bound and to the necessities of the one who receives it."

"Art. 217. The obligation to supply alimony does not include that of endowing children, nor that of providing them with capital to prosecute the business, art or profession for which they may have been fitted."

"Art. 221. The temporary guardian shall give security for the annual value of the alimony. If he should control any fund designated for the purpose, he must give legal security for it."

"Art. 224. The obligation to supply alimony ceases: (1) When the one bound lacks the means of compliance. (2) When the dependant is no longer in need of alimony."

"Art. 1376. Having rendered the justification provided in the foregoing articles, the judge if he deems the application founded shall make the designation of the amount in which the alimony is to consist and shall pronounce sentence ordering the alimony to be paid by months in advance in all cases."

"Art. 1377. Immediately after sentence is pronounced granting temporary alimony the payment of the first month shall be demanded from the one who is to pay them."

Which exceptions of plaintiffs to defendant's answer above set out after argument of counsel was by the Court sustained, to which ruling and action of the Court defendant by counsel then and there in open court excepted, and here now tenders this its third bill of exceptions and ask that the same be allowed, approved and
32 ordered filed as a part of the proceedings and record had in the above entitled and numbered cause, which is accordingly so ordered.

(Signed) March 27, A. D. 1901.

T. S. MAXEY, Judge.

(Indorsed:) Lena M. Slater, et als. vs. Mexican National Railroad Company. In the United States Circuit Court, Western District of Texas, at Laredo. Bill of Exceptions No. 3. Filed March 28, 1901. D. H. Hart, Clerk, by Geo. B. Hufford, Deputy.

DEFENDANT'S BILL OF EXCEPTIONS NO. 4.

Filed March 28, 1901.

In the Circuit Court of the United States for the Western District of Texas.

Lena M. Slater, et als.,
vs. No. 3.
The Mexican National Railroad Company.

Defendant's Bill of Exceptions No. 4.

Be it remembered that upon the trial of the above entitled and numbered cause, the following proceedings were had:

Defendant offered to read in evidence to the Court and jury the testimony of Emilio Velasco, taken by deposition and returned to court by consent of counsel for plaintiffs and defendant, which was as follows: (1) That the said Emilio Velasco was a native citizen of Mexico; (2) That he was a lawyer in Mexico, by profession and had been since January, 1860; (3) That he was a graduate of the Law School of the City of Mexico, graduating in January, 1860; (4) That he was familiar with the laws of Mexico and the States of Nueva Leon and Tamaulipas in force now and that were in force for two years past, touching the right of the surviving wife and children to recover damages for personal injuries resulting in the death of the husband and father; (6) That the right in a surviving wife and children in a civil suit for damages where no criminal proceedings had been had and defendant had been absolved, it was necessary as a pecedent to a recovery that the court trying the civil cause find that the killing or injury was a crime as defined by the penal code; (7) That the right was in the nature of alimony or pension to be paid in installment monthly, for periods of time fixed by the court; that obligation to pay alimony to the wife and children, does not imply that of giving a sum larger or smaller at once, but of giving a pension. Alimony comprises meals, dress, habitation and assistance in case of sickness; and as regards minors, besides the necessary expenses for the education of the party supported and for furnishing him a trade, art, or profession, honest
33 and suitable to sex and personal circumstances; (8) That the party obliged to give alimony complies with this obligation by assigning a competent pension, or by incorporating him into his family; (9) That the obligation to furnish alimony or support as a consequence of civil responsibility lasts all the time that the deceased ought to have lived, calculating the time according to the table of probabilities, which is a continuance of Art. 325 of the penal code, bearing in mind, however, the condition of the health of the deceased; but that this obligation would cease at any time when it is not absolutely necessary to the subsistence of the parties who receive it; therefore the obligation ceases from the moment in which the condition of fortune of the parties who receive alimony vary allowing them to subsist without the necessity of the alimony. It ceases with the wife and daughter when they marry and with sons when they become twenty-one years of age; and it ceases when circumstances are produced that according to law the obligation of giving would have ceased on part of deceased, if he had lived; (10) That civil responsibility is based upon infraction of the penal code. It is the infraction of the penal code that gives or engenders civil responsibility; (11) In case the injured party has contributed to the deed or fault or negligence or to the omissions which caused the injury, he is co-author of the offense or fault, and his representatives cannot recover; (12) That the wife and children have no right to any indemnification against a railway company on account of injuries from which resulted the death of the

husband or father when the accident in which the said injury occurred was caused by the fault or negligence or omission of the one who suffered the injury or if he contributed in any way with his fault, negligence or omission to the accident.

To the reading of which depositions counsel for plaintiffs objected, on the ground that the statutory law of Mexico, as pleaded is best proved by the statutes themselves and the statutes having been offered in evidence, the deposition of witnesses named as to what the law is, is inadmissable. Which objection the Court sustained and refused to allow the defendant to read said depositions, or any part thereof, to the Court or jury; to which ruling of the Court counsel for defendant then and there at the time excepted, and he now tenders this its fourth bill of exceptions, and prays the Court that the same be allowed, signed and approved and ordered filed among the papers, as a part of the record and proceedings had upon the trial, of this cause, which is accordingly done.

(Signed) March 27, 1901. T. S. MAXEY, Judge.

(Endorsed:) No. 3. Lena M. Slater, et als. vs. The Mexican National Railway Company. In the Circuit Court of the United States for the Western District of Texas. Defendant's Bill of Exceptions No. 4. Filed this 28th day of March, 1901. D. H. Hart, Clerk, by Geo. B. Hufford, Deputy.

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34 DEFENDANT'S BILL OF EXCEPTIONS NO. 5.

Filed March 28, 1901.

Lena M. Slater, et als.,
vs. No. 3.
The Mexican National Railroad Company.

Bill of Exceptions No. 5.

Be it remembered that on the trial of this cause the following facts were proved and proceedings had, to-wit:

MIGUIL ABASTA.

A witness called by the plaintiffs testified through interpreter W. S. Pierce, as follows:

Direct Examination.

By Mr. Williams:

My name is Miguil Abasta, I live in Laredo, Texas, and have no occupation at the present time. On the 20th day of May, 1900, I was running Engine No. 21 in the Nueva Laredo yard. I knew

William H. Slater at that time and was present when he got killed. He was killed while attempting to couple some flat cars loaded with lumber. We were making up a train called train No. 12, and one of his companions also a brakeman was cutting out cars off the road, and Slater was waiting for those cars to couple them on to the other cars. One of the couplings of one of the cars was higher than that of the other and he got caught between them and was killed. By "coupling" I mean that one of the drawheads was higher than the other. There was a difference between them of about four inches. (Witness being asked by Mr. Williams to make a rough sketch of yard as it appeared at the time of the accident counsel for defendant offered use of map showing location of cars, etc., which is accepted and marked Exhibit "A" for identification with the records in the case.)

By agreement of counsel Mr. J. N. Galbraith was permitted to explain the map as follows:

The engine came on track No. 5 from the main line with seven or eight cars and took four flat cars out of this track, pulled them back on the main line and shoved them up the straight line, these four cars representing four flat cars of lumber pulled out of this track; they appear here as they were on the main line. The engine went back on track No. 6, and took out four more cars and brought them up here and Mr. Slater was killed between these eight cars—the four standing on the main line and the four which it is supposed he attempted to couple on to. There were eight other cars behind the engine, making twelve cars in all; the place where he was killed being from the place where the engine was, a distance of about 360 to 370 feet. This is the plan of the thing as it actually occurred from measurements taken shortly after.

35 Witness Miguil Abasta resuming:

That is a correct drawing of the scene of the accident. I do not remember how many cars were between the engine and the place where Mr. Slater was killed, but think there were six or seven cars. Mr. Slater was killed because the draw-heads of the cars were not of the same height and allowed the cars to come together and mash him. At the time that the accident occurred, I was looking at Slater to see whether or not he coupled the cars. I got to him in about three or four minutes after Mr. Slater was hurt. A brakeman by the name of Pedrasco and the fireman were the first persons who got to Mr. Slater after he was hurt. The foreman's name was Enrique Rodriguez. The three brakemen, myself and fireman were all present in the yard at the time this accident occurred. Mr. Slater was mashed between what was called "platform" cars—lumber cars; they were flat cars, only they had a little board that comes up a little higher than the ordinary flat cars. I did not see Mr. Slater when he died, but I understood that he died the next morning at six o'clock.

Cross Examination.

By Mr. Dodd:

Yes sir; I was an engineer at that time. We got the four flat cars that Slater was trying to couple from side track No. 5. I pulled those four flat cars out from that track and left them on the main track. Only two remained on the main line, and the other two cars were the ones that he was trying to couple. We did not leave the four cars on the main line; only two of them. We then went back and got eight more cars; four of them box cars and four of them flat cars, to couple on to the four cars there. No, I was not backing down to couple the two cars. I was going ahead. When I got out the other cars I had to back down. I wasn't backing down to couple on to the two cars where Slater was waiting. I was going ahead. Naturally to get the cars out, you got them out backing up, but the other cars we pushed or nosed along. When we set those two cars out there and went in to get the other cars, Pedrasco was the brakeman who uncoupled them. Mr. Slater did not move from the place where he was killed; he stayed there waiting for the other cars to come out so he could couple them to the dead cars. Those two cars were standing there. I was on the locomotive and was running the engine. I saw Mr. Slater at the time he was hurt. The way that I saw him between the cars was because I want looking over the box cars—I was looking around to one side. I did not see Mr. Slater right at the moment he was hurt, but saw him when he went in and when he fell out. I saw him after he fell out, yes sir. As to the position Mr. Slater was standing in, in reference to the cars coming together to be coupled, I saw him when he went in to couple the cars. I did not see him after he got between the cars. It was then impossible to see him.

By the Court: Q. Was it day or night?

36 By Mr. Dodd: A. It was daytime.

Witness resuming: I cannot say how high the lowest car of the two he was trying to couple was. I do not know the cars. All that I can say is that one of the cars was higher than the other. I knew that one was higher than the other because I saw them. I did not measure them. I do not know anything about how high the lowest car was from the rail up to the top of the bumper, or drawhead. I cannot tell how high it was by measuring by my own body. I do not know whether Mr. Slater was the employe in charge and directing how the switching should be done some time before, or not. I do not know how long he had been working there that day, and I do not know in what capacity, whether as foreman or brakeman. At the time that Mr. Slater was hurt, both brakemen gave me the signal to go ahead. The brakeman Spencer gave me the signal for what we call "kicking" the cars, and Pedrasco the signal to couple the cars. He uncoupled the cars and let them go on running of themselves. The cars that Slater was attempting to couple were not connected at the time—they were running alone. Pedrasco was the one who uncoupled them. The cars were not going backward—

they were going in the direction of the place where Slater was waiting for them.

Re-Direct Examination.

By Mr. Atlee:

By "kicking" cars we mean to start them fast and then get a signal to stop, the cars were uncoupled and go by themselves. This is done in order to save time and to get on with the work. In this instance we kicked the two cars in this manner. The cars that were kicked were going toward Slater. Slater was waiting for them in order to couple them on to the other cars. When we "kicked" those cars, the distance from that place to the place where Slater was standing waiting for them, was about five or six car lengths. I do not know what the length of a car is. In order to kick cars, a good part of the train must be sent at an accelerated speed, and then stopped and let the uncoupled cars go. We kicked cars to save time. In that way we [are] enabled to get through with our work in more rapid manner. When we kicked the cars down there where Slater was, he was standing at the outside track, on the same side that I was on the right side. The two cars to which the moving cars were coupled formed a part of the train we were making up. I was making up the train. My engine was headed towards Slater.

Re-Cross Examination.

By Mr. Dodd:

I have talked to nobody about this case; nobody at all. I am in nobody's employment at present. I have not been to San Antonio. I never talked to a man by the name of Henry about this case. This is the first time I have seen Mr. Williams, the lawyer, and it is also the first time I have ever seen Senator Atlee. I never saw him before. I never talked to anybody about this case. I never talked to Mr. Fly about it. I did talk to Mr. Galbraith shortly after the thing happened, in Nueva Laredo, yes sir. They didn't ask me to make a statement in writing as to how the accident occurred. Mr. Galbraith was the superintendent and I did not see him afterwards. They didn't have any investigation in Nueva Laredo before the Courts there, that I know of. I never testified before any court over there in a criminal investigation. It is not so that I ever talked to Jim Hill, who drives the beer wagon for Mr. Barthlow, agent for the San Antonio Beer Company, and told Mr. Hill that Mr. Henry had offered me a position in San Antonio if I would testify for the plaintiff in this case. I never told Mr. Hill that. That didn't occur two or three weeks after the accident; and I didn't tell Mr. Hill among other things that I was offered a thousand dollars out of what was made out of the case. I did not sell myself. I didn't say anything about the position and money offered me to Mr. Juan Veerhan, the engineer on the Mexican National Railroad, on the other side of the river, or else-

where. I have just told you that I did not sell myself, and I did not make any such statement, to him.

Witness excused.

ENRIQUE RODRIGUEZ, a witness called by the plaintiffs, testified through interpreter W. S. Pierce, as follows:

Direct Examination.

By Mr. Williams:

My name is Enrique Rodriguez. I live in Laredo, Texas. In May, 1900, I was working for the railroad in the occupation of fireman. I was on the engine at the time, between the tender and the engine cab. I was on the engineer's side at the time. Mr. Slater was standing there, waiting for a lumber car that had been "kicked" back, so as to couple it on to another car that was standing. The draw-head of the car standing was higher than that of the other car which was to be coupled on, and as Mr. Slater lifted up the link to couple the two cars the link broke and his left leg was caught. The reason that the two cars came together was because the draw-head of the car that was standing was higher than the draw-head of the other car, and slipped under it. Only the two brakemen, the engineer and myself were present in the yards at the time the accident occurred. When Mr. Slater started to go in to make the coupling, I was looking where he was, on the side where they were working. I saw Mr. Slater when he went between the cars to couple them. The next time that I saw Mr. Slater was when he fell to the ground. The cars bumped together and then bumped apart, and Slater fell to the ground. I do not remember who was the first person who got to Mr. Slater, but know that when I got there, there was one person there. There were about eight cars between the engine and the place where Mr. Slater was killed. The two cars that were kicked down were loaded cars.

38

The ones that were standing still were loaded ones also. Both the cars that were kicked down and the standing cars were to form a part of a train that we were making up. I do not know where the cars had been loaded. They were there on siding No. 5, and did not know where they had been loaded. I could not tell you whether they were loaded in Mexico or in the United States. Mr. Slater's thigh was mashed here (indicating across thighs) where one of the draw-heads came over the other draw-head, it caught his leg. I could see Mr. Slater when the cars mashed him. I was on the side where the engineer was. Slater was out of my sight when the cars came together and mashed him, but I afterwards saw him when he fell out.

Q. If the draw-heads of the two cars had been of the same height, so that they would have struck together, or against each other, what would have been the distance between the framework of the two cars?

A. There would have been no accident to Mr. Slater if the

draw-heads of the cars had been of the same height. If the two draw-heads had come together there would have been a distance between the frame work of the two cars of half a yard, more or less, or about a foot and a half. If one draw-head slipped over the other the framework of the cars would come together. The process of "kicking" cars is simply throwing or shoving the cars off, that is, "kicking" them away from the engine. The engine was facing towards Slater at the time of the accident.

Cross Examination.

By Mr. Dodd:

I was fireman, yes sir. My position was on the opposite side of where the engineer sits, but as the time was very hot, I was standing over on his side. The engine was facing neither north or south, but in this direction (indicatinig) east and west. At the place where the accident occurred it is south of the depot. The cars that Mr. Slater was trying to couple were standing on one of the side tracks. They were standing there at the time Mr. Slater got hurt. He was mashed on the main line, but part of the train was on the other track. I do not remember whether there were two or four cars standing there on the track. When they came back to be coupled on the four cars on the main track, there were seven or eight cars to the locomotive, but I do not remember how many flat cars nor how many box cars, I did not notice and cannot say how many of each. Between me and where Slater was there were not all box cars—there some flat cars—lumber cars—and some box cars. There were some seven or eight cars between where I was and where Mr. Slater was. No sir; it is not a fact that as they backed in there to make that coupling, instead of making the ordinary "flying switch" or "flyer," the coupling link that held those cars together came into, or broken and the cars went back of themselves, not under control of the engineer at all. They were uncoupled. Cipriana Pedrazo uncoupled the cars. After these cars were uncoupled and before they got back to where Slater was, they went two or three car lengths. Slater was on the right side of the track and I was on the same side. As to my understanding how cars
39 are coupled by brakemen going in between them and as to whether I understand how to couple cars myself, I will answer that I have seen them coupled a long time, I have never acted as a brakeman though. In answer to Mr. Williams' question just now I said that Slater went in and took hold of the link to raise it and couple it and it broke, I know that because I have seen that happen very often. The draw-heads were not of the same height. I did not see Mr. Slater take hold of the link; no sir. When I got down there the cars had separated one away from another. It is a fact that all I know about it all is that I saw him go between the cars and then saw him fall out injured. That is all I know. I couldn't see him when he was between the cars, but while he was standing there waiting for the cars, to couple them, I could see him. The

cars caught Mr. Slater on the left thigh, here (indicating). I do not know whether the other thigh was crushed or not. I do not know the height of those two cars. From the ground they were of *the ordinary height of flat cars, only* one car was higher than the other. I cannot give their exact height. I do not know what position Mr. Slater was in when he was in between those cars. While he was between the cars I do not know whether he was sitting on one of the cars or standing between them. I know that he was standing on one side waiting for the cars to come up so as to couple them. I did not see him after he went in between the cars. As to what part of the body two cars coming together, one running up over the other through any defect, they would crush a man standing between them, I would answer that it depends on the height of the man, also the height of the car. It would be different with a short man from what it would be with a tall man. I have talked to nobody about this case. No, sir; Abasta and I have talked to nobody about the case. We live here, work together, and have been together all the time—we run together—but we have not talked about the case.

Re-Direct Examination.

By Mr. Williams:

It was Slater's duty to couple the cars when they got back there. He went in between them for the purpose of coupling them.

Re-Cross Examination.

By Mr. Dodd:

I do not know that it is not the duty of a brakeman to go between two cars when they are coming back at rapid speed, not under control of the engineer. In making up a train very often cars are sent back not under the management or control of the engineer. What I know about the duties of a brakeman is what I have seen while working as a fireman. Since I have been working as fireman, what I have seen brakemen doing is all I know about their duties.

Witness excused.

40 MRS. LENA ANN SLATER, a witness in her own behalf, testified as follows:

Direct Examination.

By Mr. Williams:

I am the plaintiff in this case, being the widow of William H. Slater. Mr. Slater and I had four children, their names and ages being Willie Slater, sixteen years old; Jesse Slater fourteen years old; Annie Slater, six years old, and the baby, fourteen months old. I am thirty-two years old. Mr. Slater, when he died was past forty-two years old. As to his health, when he died, he was strong enough to make a living for me and my children. His general health was good. He certainly did make a living for me, too, or I

would not have had a living. I had no other means of support. I do not know how much Mr. Slater was getting at the time of his death. I wasn't there. I think that Mr. Slater commenced working there about the 15th day of April, though I am not sure about that. He came out here on the 9th of April. It was about a month before I think it was the 15th when he went to work for them. He was injured on the 20th of May, and died on the 21st of May. Prior to that time and before he came here, he had been engaged in running a freight wagon in Kenedy. He earned from two to three dollars per day, sometimes less. This money he brought to me every night. As to his habits, he stayed at home with me and was sober and industrious. Before he began running the freight wagon at Kenedy he worked on a farm; and before that time he had been engaged in railroading. He was an old experienced railroad man. Mr. Slater's father and mother are dead. He contributed to the support of no one else except myself and children.

Cross Examination.

By Mr. Dodd:

No; I was not paid the amount that was due my husband at the time he was killed. No, sir; I did not receive it all, because he had some little debts. I did not pay these debts, but had Mr. Austin to pay them for me. I do not remember the amount that I received. As to when Mr. Slater came here, he left home on the 9th of April, but I cannot say when he went to work. I do not know when he began work—I don't know the exact day, but guess that Mr. Galbraith can tell you. Yes, before he came here he was engaged in the wagon business. He was making in this business on an average of from two to three dollars, sometimes less. Before that time he had been farming. He was engaged in farming between five and six years. He had been a brakeman and also a conductor on a railroad before that time. I do not remember what roads he worked on, but he was a conductor on this road also a brakeman on this road. He had been farming five or six years before he came here to Laredo and was hurt. I said that he was about forty-two years old, not forty-three. As to when he was born, I guess you can count and see, if he was forty-two. I cannot count it up. I know though that he was past forty-two, the third of April. That
41 is on the third of April, 1900, he was forty-two years old. I am thirty-two years old, yes sir. My oldest child is sixteen years old. He is a boy, and will be sixteen years old this coming August. His name is Willie Slater. My next child is a boy fourteen years old. My next one a girl seven years old. My youngest is a baby, a boy, fourteen months old.

Witness excused.

L. E. AUSTIN, a witness called by plaintiffs, testified as follows:

Direct Examination.

By Mr. Williams:

My name is L. E. Austin. I live in Laredo. I am related by

marriage to Mrs. Slater. I saw Mr. Slater shortly after he was injured. He was hurt worst here on the leg (indicating the left leg), he was mashed all to pieces in the hip. The right leg was considerably bruised, but not broken, but left leg was broken. Before he was injured he was a strong healthy man. At the time he was injured I think he was earning about one hundred dollars, Mexican money, per month. I received his pay for Mrs. Slater. He had about sixty dollars, Mexican money, and there were about sixteen or seventeen days' pay coming to him.

Parties agreed that Mexican money is worth 50 cents on the dollar in U. S. Cy.

Cross Examination.

By Mr. Dodd:

I have known Mr. Slater about ten or eleven years. Before he was injured he had been working for the company about a month and a half or two months. I know when he came here, yes, sir. I would not be positive about what month it was when he came here, but think that it was about a month and a half before he was hurt. I do not remember exactly the day he was hurt. He was here only a few days before he went to work. He boarded with us, yes, sir. His family were not here at all, at that time. He was to pay twenty dollars per month, American money, for his board. That is the usual price.

Witness excused.

Plaintiffs rest.

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42 J. N. GALBRAITH, a witness called for the defendant, testified as follows:

Direct Examination.

By Mr. Dodd:

I am superintendent of the Mexican National Railroad Company. I have been railroading twenty-seven years. I am superintendent of the division of the road that Mr. Slater, deceased, was injured on. I saw Mr. Slater after he was injured, in the hospital, after they brought him over to this side of the river. I did not see the cars where Mr. Slater was injured, but saw them a few minutes afterwards, in another portion of the yard. I was told by a man who witnessed the accident that they were the same cars; that those were the two cars that hurt Mr. Slater. The height of the drawhead of one of those cars was twenty-three inches above the rail to the bottom of the drawhead, and the height of the drawhead of the other one was twenty-seven inches, there being practically four inches difference. When I saw those two cars they were in good condition; the two drawheads were in good condition and not broken. The cars were loaded with lumber. The dead car was the high car—the large car. I am simply giving this testimony from what the men told me. They told me that it was the high car.

Whereupon, counsel for defendant produces plat heretofore offered in evidence and marked Exhibit "A" by the stenographer, and requests witness to explain the same to the jury.

43 This is an accurate drawing of the yard. Here is where the engine stook [stood] when starting to push the twelve cars up to where those cars were standing still. She pulled them out of this track up to the switch, and started out here to pull them up to couple on those four cars which were previously standing. She backed up here, and I cannot testify what occurred, because I was not there. These four cars here (indicating), this, that, that one and that one, were standing on this straight track. The engine brought twelve more cars out of this side track here down to this switch and started to back them up to couple on to these four. The position that brakeman takes when those couplings are made between two cars coming together as those two were, is to go between the cars from the outside, sidewise, and reach in and make the coupling when the cars come up to the drawheads. He usually goes in sideways, but he does not need to do so. He can go in straight. When one of the drawheads is higher than the other, he is not expected to draw the link; the link will make an entrance; one of the cars is never so much higher than another that the link would not enter. Two cars coming together like these would catch a man my size, between their timbers, somewheres about the hips. Yes, sir; I have been railroading for twenty-seven years, and am familiar with the manner in which brakemen perform their duties and the rules governing them in the performance of their duties. I will illustrate how these two drawheads come together and how they are fixed.

(Whereupon witness illustrated the cars by two law books, one comparatively larger than the other, placed lengthwise on the table, the large book in front of the small book, representing respectively the large car or high drawhead, and small car, or low drawhead.)

The car that was standing still stood in about that position (indicating with large book). There was a space of about 3 1-4 inches from the top of the larger car to the bumper of the small car dropped to; in other words, the small car did not go under it; it was three and one-quarter inches too high for the small car to get under it, and the small car caught the drawhead of the larger car three and one-quarter inches above the bumper.

After the accident occurred, I saw the cars within probably fifteen or twenty minutes. They had moved to where I saw them directly after the injury was caused, and they were taken out by the men who did witness the accident. As to the condition of the two cars at the time I saw them, their bumpers were in the same condition and they came together just as I have described it. I knew Mr. Slater very well. He was a little taller than I am, probably two or three inches taller than I am. (Witness being about .....) As to what position a man of that kind would have to be in, to be

injured in what would be called the upper middle femur, a little above the upper femur of the thigh—to be crushed in that manner —it is hard to tell what the two cars would do if they ran together. A man cannot tell just what took place in there, unless he absolutely saw it.

44 Q. Suppose the coupling link was pinched in the dead car and could not be removed, and the link in the moving car was also pinched and could not be removed, and a brakeman with full knowledge of these defects goes in and takes a seat on the live car, intending to get the link out when the cars come together, what would be the effect?

A. The effect would be that the link of the higher car would enter the drawhead of the smaller car, and would have a tendency to throw the smaller car under the larger one. The link in that car was not pointed out to me. There was some dead wood that projected out beyond the bumpers of the highest one of these cars —the dead car.

Question by the Court: Kindly give an explanation of what you mean by "dead wood" on the car.

Witness resuming: This is a block that comes out 5 1-2 inches by 10 1-2 inches long, comes out from the car to the drawhead. That represents what is called the "dead wood." Anything that is to be coupled to a car is to be fastened to that. That is fastened to the head of the other; that is, the high car.

Witness excused.

CIPRIANO PEDRAZA, a witness called by the defendant, testified through interpreter W. S. Pierce as follows:

Direct Examination.

By Mr. Dodd:

My name is Cipriano Pedraza. On the 20th day of May, last year, I was engaged in the business of brakeman. I knew William H. Slater. I only knew him about eighteen days. I was present and working with him at the time he was injured. At the time he was hurt, I was distant from him about twelve car lengths. We went on to track No. 5 and took out eight cars and cut off four cars on the main line. We then went with the remaining cars onto track No. 6 to pull out eight cars that were on there, track No. 6. We then gave a signal to go ahead on track No. 6, and went out on to the main line. Mr. Slater got on top of the front car, ahead of the car, to couple the cars. When we gave the signal to stop, four other cars loaded with lumber that were ahead, were cut off. When the four cars were cut off then, he was caught between the cars. After the cars were uncoupled from the engine, and were cut off, they went about one and a half car lengths. Nobody uncoupled these cars. They uncoupled themselves. The link with which they were coupled broke; I mean the pin in the link. I did not uncouple the cars myself. At the time Mr. Slater got hurt the coup-

ling links were pinched. We could not draw out either of them. Mr. Slater noticed that they were in that condition, because we told him. He said in reply that he could remove it; he could get it out. When the cars broke loose from the engine we called out to Mr. Slater that they were uncoupled and to get out of the way. I do not know where he was at the time he was hollered at, because we could not see him. He was sitting on the front of the car, and we gave the signal to stop, and of course, we could not see him.

Question by the Court: Who was sitting on front of the car?

A. Mr. Slater was.

After the accident, the links in both drawheads were broken. The cars stopped far enough apart for him to get out. I do not know what Mr. Slater got on top of these cars for, only that he was going to couple the cars; that was all. That is all I know about this case. Mr. Galbraith and Mr. Lattig arrived there at the place of the accident within twenty minutes, at most, after the accident; as long as it took a man to go to the depot. Mr. Lattig and Mr. Galbraith didn't get there together, because one was at the depot and one was near by the depot.

Cross Examination.

By Mr. Atlee:

When Mr. Galbraith got there Mr. Slater was on the ground. Mr. Lattig got there first. The way Mr. Galbraith was notified, we told the yardmaster and he told one of the employes—one of the servants. I do not know whether Mr. Galbraith at the time was on the Mexican side of the river or on this side. After the accident occurred, Mr. Slater remained on the ground about an hour, at most, before he was removed to this side of the river. Before Mr. Galbraith arrived there he had been lying there an hour at most. When Mr. Slater was hurt I was about twelve car lengths from him. The engine at the time was behind the cars pushing them. It was pushing the cars that injured Mr. Slater. They had already stopped and the engine was behind the cars. I did not say that the cars were cut loose from the engine; the four cars were part of the cars which the engine had, and they were cut loose from the other cars. The engine was pushing twelve cars, and four of them became uncoupled. As to how they became uncoupled when the engine was pushing them, when we gave the signal to stop, the link with which they were coupled broke, and four cars kept going. I can not say what caused the links to break. The coupling pin was the only thing that broke. I am sure that it was only the pin that broke, and not the link. I do not think that it was broke before, but only as the cars separated there. The engine stopped so suddenly that it caused the coupling pin to break. Four cars were loosed in that way. They were loaded with lumber at the time. They were not backing those cars down to where Slater was, they were pushing them ahead. They were doing that to make up the

train. Slater was there just to couple the cars—that is all. He was on the cars that were moving. In regard to how he was hurt, I have told all that I have seen. I told all the people in charge of the train that the link was stuck, and I also told Mr. Slater, the man who got on top of the cars. When I told him that he was with me, we were together on the same car. I got off the car and Mr. Slater remained on the car. I am still in the employ
46 of the railroad company. I have never told this story to anybody here. I have never spoken to anybody about it, or had to tell anybody anything. I have never spoken to anybody about the matter, only just to mention it to my employer, the man under whom I am working, just to tell him how the thing happened. I am not working over the river. I have been in the employ of the company for eight years. When we went on to track No. 6 Mr. Slater went there with me. We were to get out some cars, so that we could bring the twelve cars out from track No. 6. Before that Mr. Slater had been on the ground with me. We were both on the ground together. When I got out the cars we both went back on the cars. You did not understand me to say that Mr. Slater was sitting on this drawhead or bumper; but "by" the drawhead; there is a drawhead and then a bumper, and he was sitting "by" the drawhead. The reason I could tell where Mr. Slater was at the time of the accident happened, although I was twelve cars from him, was when he got on the cars he got right by this drawhead, and got in that position to uncouple the cars. When I got off the car and went to the switch, and was yet about one car length beyond the switch, I saw the car coming, and Slater was on that car in that position, ready to make the coupling. I was twelve car lengths away from him; yes, sir, but the cars ran ahead and went on. When this accident occurred I was from the car the distance of as many cars as between me and the engine. I was at the switch and the train went on ahead. When the cars were moving I was three or four paces from the switch. I didn't see Slater any more after he passed the switch. The cars were loaded, yes, sir. I saw Mr. Slater when he was going by the switch. When he went by the switch he was on the car, but I did not see him again until he fell out. It is not possible that he could have gotten off the car. He did not get down off the car until he was hurt. I didn't see him any more until after he was hurt.

Re-Direct Examination.

By Mr. Dodd:

(Introduces to witness plan previously filed in evidence and marked Exhibit "A.")

Q. These are the four cars that broke loose (indicating the four cars on the plan.)

A. Yes, sir. I was standing here (indicating switch on plan) at the time the cars went past and I didn't see him any more. When Mr. Slater fell out he was here (indicating). When the four

cars broke loose and we signaled the engineer, the cars were about this far (indicating). It was a pin in the car that broke. Immediately the cars broke loose I hollered at Slater, who was ahead, to get down—that the cars were loose. I made a statement to Mr. Galbraith soon after the accident, as to how it occurred. That statement was reduced to writing. Mr. Galbraith wrote it down. It was a long time after the accident before I made the statement. I do not remember when.

Re-Cross Examination.

By Mr. Atlee:

Yes, sir; the engine at this point (indicating on the map) had set out four cars along here, which they got from track No. 5. After placing those four cars there they came around to track No. 6. We came on to this track and drew out eight cars—four box cars and four lumber cars, we had four cars already attached to the engine, making in all twelve cars. When we got back on the main line I got off the cars at the switch, to take these twelve cars attached to the engine and couple to the other cars on the main line. My object in getting off at the switch was to turn the switch so the train could go out on the main line. Our object in getting on to the main line again was to couple on to these four cars. When these four cars broke loose, the train was about here (indicating on the map) and I was standing here (indicating near the switch on the map). The reason that the cars broke loose from the train was because the pin was broken—it was broken by the jerk of the engine. The jerk of the engine was caused by its reversing and putting on the air brakes. The reason the engine reversed, was because we gave the signal to go fast, they went fast and then stopped. As to the necessity of going fast when we were approaching these dead cars, when we got along here we found that we had more speed than was necessary, so we gave the engineer a signal to stop, because the cars that were first could have gone on by themselves, and the engineer reversed so quickly that it broke the pin. The engineer started very fast, and we gave him a signal to stop because I wasn't going to uncouple any cars.

By Mr. Williams:

When I hollered at Slater I was four or five feet from the switch.

By Mr. Dodd:

Yes; it was my duty to give the engineer a signal, as he approached, to slack up, so that the coupling could be made. That is why we gave him the signal. When we gave the signal the engine stopped so suddenly that it broke the pin, and the four cars broke loose. I then went out from the cars and hollered to Slater.

Witness excused.

JIM SPENCER, a witness being called for the defendant, testified as follows:

Direct Examination.

By Mr. Dodd:

48 My name is Jim Spencer. I am engaged in switching in the yards of the Mexican National Railroad Company. I was engaged in the same business last May. I have been working for the Mexican National Railroad Company for fifteen or sixteen years. In last May I was working in their yards in Nueva Laredo. I knew William H. Slater, and was present at the time he was injured. On Sunday morning we only had one train to make up, and the yardmaster gave me the list. Mr. Slater, Pedraza went over to track No. 5 and picked up eight cars—four box cars and four flat cars, took them up to the main line and threw out the four flat cars on the main line, loaded with lumber. We then went on to track No. 6 with four box cars and picked up eight more cars. I stayed at the switch and Mr. Slater and Pedraza went down to couple up the cars. They then backed out and came up to No. 6. Pedraza got off there to throw the switch and told Slater that the link was fast and he couldn't get it out. Slater said that he could get it out and gave the engineer a signal to go ahead. When we gave the signal to stop the cars broke in two, and we hollered to Slater to get out—or to look out—but he didn't get out, so we went down there to see what was the matter. We didn't see Slater any more until after he was hurt and fell out. The last time that I saw he was sitting on the spring board of the small car. After he fell out I went immediately to him. I was there when he fell out. He was sitting on the spring board when I saw him—some of the flat cars have a spring board—and he was sitting on the spring board, trying to get the link out. He never did get it out, and we gave the engineer the signal to stop and the cars broke in two. We hollered to him at the time that the cars were broke in two and to get out. We were making up a train at the time and I was actually in charge of that train. Mr. Lattig is the yardmaster, and was at the time. I don't just remember how many cars were to compose the train that we were making up. We were making up twelve to go out that night. Those first four cars that we brought in were going into that train. Those eight box cars were to constitute the train also. The reason that we gave the engineer the signal to stop was because he was going too fast. We wanted to stop him so that we could make the coupling. At the time we gave the signal the hindmost car was from the four cars that we were going to couple on to, about as far as from here to that stove (indicating in the Court room about fifty feet away), or further possibly. When the engineer reversed, the pin broke. Immediately I hollered to Mr. Slater. I could see him. He was sitting on the car. If he had jumped out I could have seen him surely. I could have seen him over the flat cars. I was the first person to him after he was hurt. He was hurt in the left leg about the thigh. I did not examine him. I was holding his head. We had to shove the cars around on another

track so as to get him across the river. We had to go and get a car to take him over the river. Mr. Lattig arrived there fifteen or twenty minutes after the accident. There were some Mexicans down there holding his head while I pushed the train around and then I told Mr. Lattig. The links in the cars which were standing still we could not get out at the time, but
49 we did not know that the link in the other cars were fast until we came out on the main line, and then Pedraza told Mr. Slater that the link was fast. Mr. Slater had noticed that the link was fast, but he said that he could get it out, and we gave the signal to go ahead. There was enough caution given Mr. Slater about the link. I could have got out. We told him that it was fast. He insisted that he could get it out, though. We made the coupling afterwards. I made it myself. I got the links out and both of them were broken. The link in the car that was going back, I found after the accident, one-half in the car and one-half on the ground. Both of the links were broken, and half of one was in the drawhead. Mr. Slater's left leg was the part that was caught and hurt. After the accident we had no trouble in making the coupling. I did not examine the car to see what portion of it had caught his leg and mashed it.

Cross Examination.

By Mr. Atlee:

Pedraza was working with us there. There were three of us. I was foreman and he and Slater were switchmen. Pedraza was a switchman, yes, sir. My position in switching around there is that of foreman; I was supposed to be the "boss;" I was expected to be anywhere. At the time that they went back on to No. 6 where they got the eight cars, I was checking up the cars then. I was near the switch, toward Mr. Slater, when the cars came out to the main line. I refer to before the accident occurred. At the time the accident occurred I was standing near the switch—about fifteen feet away from it. Pedraza was behind No. 6 switch. I was betweeen No. 5 and No. 6 tracks; I was betweeen Pedraza and Slater, about four car lengths from Slater at the time the accident happened. The cars broke in two right about where I was. From where the four cars broke loose to the dead car was about as far as from here to that stove (indicating stove in Court room—about fifty feet). I guess it was about six car lengths away. I was four car lengths from Slater when he was hurt. The rest of the train was behind me. No sir; when the cars broke in two I was not four car lengths from him; I was six lengths. When the cars broke loose I was walking towards Slater. I gave the engineer the signal to stop, and he threw the lever over, but those four cars never did stop and I was wondering what was the matter. I looked around and found that the cars had broke in two and hollered to Slater to get off. The cars were then four lengths from where I was standing and hollered to Slater.

(Witness is shown map in evidence.)

We got into No. 5 and picked up eight cars, and came out here (indicating) and picked up four cars down here. We went into No. 6 while holding on to these four cars, and picked up eight more flat cars, and go back up the main line. The engine went on ahead and we went down to No. 6 and I came along between No. 6 and No. 5. The engineer kept going so fast that we gave him the signal to stop, and the cars broke in two. When I hollered to Mr. Slater, I could see his feet hanging down. I was about where the four cars broke loose.

Re-Cross Examination.

By Mr. Williams:

Some cars are about thirty feet long and some not; some are twenty-eight, some twenty-nine and some thirty. I didn't notify the engineer, because I was too far away from him. I wasn't looking at the engineer at all. I knew that the pin was pinched in the [car] in which Slater was riding, at switch No. 6, because I tried to get it out and could not do it. The engineer was going to stop so that the cars could be coupled, but the four broke loose and he could not stop them, or he would have stopped them. They broke in two because the engineer stopped so suddenly. We gave him the signal to stop. There was only one pin broke that I know of. The link was pinched also in the dead cars, yes, sir. There was also a link pinched in the moving car. There was a link and coupling in each car, both the moving car and the dead car. I could not tell you how fast they were moving at the time they started down. I can not say whether they were going faster than ordinary or not. We have limits to run four miles an hour; sometimes we confine ourselves to that limit, and sometimes we do not. I could not tell whether we were running faster at that time or not. Yes, sir; I stopped them that time because they were going too fast to make that coupling; we couldn't make the coupling with the train going so fast. We gave the signal back at No. 6 to stop, to get the link out. I do not know the height of the drawheads of the two cars. I never measured them. No, sir; I do not think that those links that were broken in the dead car and the moving car were broken before the collision. After the collision I found at least one-half of the links on the ground, and one-half in the drawheads.

Witness excused.

F. A. LATTIG, a witness called by the defendant, testified as follows:

Direct Examination.

By Mr. Dodd:

Last May I was engaged in the business of railroading, as yardmaster in Nueva Laredo. I remember the day that Mr. Slater was injured. I have been engaged in railroad business about thirteen

years. I am familiar with the duties of a brakeman. I have "braked" myself. I saw Mr. Slater after he was injured, probably fifteen or twenty minutes after he was injured. The cars at the time had been moved from where he was injured. I examined the cars afterwards, with a view of ascertaining what portion of the cars he was injured by. The draw-heads on what are called the low car—the bottom drawhead on the high car, by actual measurements which I took and marked down was 3 1-4 inches
51 above the bottom of the other drawhead. Mr. Galbraith and I jointly took the measurements, and we both kept note of them, and his illustration of how the drawheads came together is just exactly as I would illustrate them. One of the drawheads, fixed in the end of the bumpers, is put on what is called the "spring board;" that is on the lower car, nothing more or less than a board attached in front of the bottom of the car, between the edges, and is simply to take the force of any blow that may occur. The other car was what was called a "standard" car, and the drawhead was inserted to make a continuous draw bar passing through what Mr. Galbraith explained was the "dead block." The dead block in that case is to take the force of any blows that may occur when coupling cars. Mr. Slater was sitting close to the drawhead, or as near as I could tell from the condition of the car, when his leg was crushed.

Then I found that the dead block of the larger car had gone right up against the spring board of the smaller car, and passed actually over it. That had no evidences of blood on it, but there were pieces of his clothing. That dead block is covered with sheet iron probably three-eighths of an inch thick, and the bumper of it is rough, and some pieces of clothing were caught on the rough edges of the iron. If a man had been sitting there only the leg would have been caught. Mr. Slater's left leg was caught. It would catch both legs to a certain degree, for the simple reason that the dead block against the spring board of the other car presses the two pieces of the cars very closely together, and if the drawheads are not broken they will come partly up to the top and partly over the other.

Had he gone in a standing position to uncouple the cars, it is quite likely that he would have been crushed further up, as he was a man about my size, and here (indicating across lower abdomen) is where the cars struck me. I was not there at the time, and all I know is from the position of the cars when the [they] touched. At the time of the accident, there were other cars besides those to constitute the train; if I remember rightly they were to have about fifteen cars in the train. Eight of them were cars of lumber. The reason they were taking those out first was because the flat cars always go behind the box cars, and that was the reason that they made the switch. The undertaking to uncouple those cars safely, the proper position of the brakeman would have been at the dead car, before he attempted to make the coupling. He should have cautioned the engineer to come at a degree of speed that would have

enabled him to safely make the coupling. Even if he had been at his place in this instance, and had given the engineer notice, it would not have helped him any, because the cars had broken away and were running by themselves, and the engineer had no control over them.

Witness excused.

Parties agreed that the Mexican National Railroad extends from the east margin of the Rio Grande River to Mexico City.

52 Counsel for defendant thereupon offered in evidence depositions as follows:

By Mr. Dodd:

I offer the testimony of Emelio Velasco, Luis Gutierrez Otero and Fernando Vega, three witnesses, taken before the United States Vice-Counsel in the City of Mexico, and turned into Court by agreement of parties.

Counsel for plaintiffs object to the introduction of the testimony or depositions of the witnesses named on the ground that the statutory law of Mexico, as pleaded, is best proved by the statutes themselves, and the statutes having been offered in evidence, the depositions of the witnesses named as to what the law is, is inadmissible.

The Court sustains the objections of plaintiffs.

To which action of the Court in so sustaining said objection, counsel for defendant then and there at the time duly excepted.

Defendant rests.

In addition to the above testimony the following provisions of the statute laws of Mexico, which were agreed upon by all parties as being the laws of Mexico relating to this case, were read in evidence as follows:

All of the laws of Mexico set up in plaintiff's original petition and which are copied into defendant's bill of exceptions No. 1, and all laws copied into defendant's bill of exceptions No. 3, and which are here made a part of this bill, and in addition thereto the following laws of Mexico, to-wit:

"Art. 215. If the obligation to give alimony falls upon several and all are able to give it, the Judge shall apportion the amount among them according to their means.

Art. 216. If only some of these are able, the amount of alimony shall be apportioned among them; and if only one should have the means, he alone shall comply with the obligation.

Art. 218. The right to demand that alimony be made secure exists in favor of: I. The person entitled to alimony. II. The relative in descending grade who may have him (the person entitled thereto) under his parental control. III. The guardian. IV. The brother and sisters. V. The public department.

Art. 219. If the person who demands security of alimony in

the name of the minor, cannot and does not wish to represent him in Court, the Judge shall appoint a temporary guardian.

Art. 22. Where the father enjoys the use of the property of the child the value of the alimony shall be deducted from it
53 (the income) if it is sufficient to cover it (the alimony). On the contrary where the income is not sufficient the difference shall be (a charge) on the account of the father.

Chapter 1 of Book 11f, Title 1, Civil Procedure. Temporary Alimony.

Art. 1372. In order to decree alimony to the one who has the right to exact it, it is necessary:

I. To make complete proof of the right under which it is asked.

II. To prove approximately, at least, the means of the one who should give alimony.

III. To make sufficient proof of the urgent necessity for temporary alimony.

Art. 1373. The proof required under paragraph 1 of the preceding article, shall be the last will, the contract or executory instrument which contains the obligation to give alimony; the contract will have to be in form of a public writing.

Art. 1374. When alimony is asked on the ground of consanguinity, the documents should be presented which prove the interested party within the cases provided in articles 207 to 210 and 3324 and articles of the Civil Code, relating thereto.

Art. 1375. When the husband or wife asks alimony, the act or certificate of marriage must be presented.

Art. 1376. After compliance with the provisions of the preceding articles, the Judge, if he believe the right has been established, shall designate the amount of alimony and shall adjudge it, directing it to be secured months in advance in all cases.

Art. 1377. Immediately on adjudging temporary alimony, the first monthly payment shall be exacted of the one liable for it.

The above testimony and laws constitute all the evidence introduced upon said trial.

Whereupon the defendant, before the jury retired to consider their verdict, requested the Court to give the following charge to the jury, to-wit:

Lena M. Slater, et als.,
vs. No. ?
Mexican National Railroad Co.

The defendant moves the Court to instruct the jury as follows: "The jury are instructed to find a verdict for the defendant."

THOS W. DODD, Attorney for Defendant."

Refused. T. S. MAXEY, Judge.

Which charge the Court refused to give.

54 To which ruling and action of the Court the defendant then and there in open Court duly excepted, and now here tenders its bill of exception No. 5, and asks that the same be signed, approved and made a part of this cause, which is accordingly done. Signed March 27, A. D. 1901. T. S. MAXEY, Judge.

(Indorsed:) The Circuit Court of the United States in and for the Western District of Texas, at Laredo. No. 3. Lena M. Slater, et als. vs. Mexican National Railroad Company. Defendant's Bill of Exceptions No. 5. Filed this 28th day of March, 1901. D. H. Hart, Clerk, by Geo. B. Hufford, Deputy.

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55 DEFENDANT'S BILL OF EXCEPTIONS NO. 6.

Filed March 28, 1901.

In the Circuit Court of the United States for the Western District of Texas.

Lena M. Slater, et als.,
vs. No. 3.
The Mexican National Railroad Company.

Defendant's Bill of Exceptions No. 6.

Be it remembered that on the trial of this cause the following proceedings were had:

After the testimony was closed, as shown by bill of exceptions No. 5, and argument of counsel was made to the Court and jury, the Court charged the jury as follows:

Charge of the Court.

Gentlemen of the Jury:

This suit was instituted by Lena M. Slater as the surviving wife of William H. Slater, deceased; and William F. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater, the minor children of the said plaintiff, Lena M. Slater; and her deceased husband, William H. Slater.

The purpose of this suit is to recover damages of the defendant, the Mexican National Railroad Company, growing out of the death of William H. Slater, deceased, who it is alleged, while in the employment of said defendant, and acting as switchman or brakeman, was, during the month of May 1900, killed through the negligence of the defendant in failing to provide suitable appliances with which to perform his accustomed work. The distinct act of negligence alleged in the petition, and which you will alone consider in this case, is set forth by plaintiffs in the following language:

"That the cars that said Slater was attempting to couple at the time he received said injuries, were flat cars; that the draw-head of one of said cars was higher than the draw-head of the other car, and the centers of said drawheads were not opposite, but on the contrary the respective height of said draw-heads were so unequal that when said two cars came together one of said draw-heads could pass over the other, and when the said William H. Slater went in between the cars to make the coupling, one of which was standing still and the other was being moved by an engine, the high draw-head passed above and on top of the low draw-head, and permitted the ends of the two cars to come together and mash and injure said William H. Slater, so that he died, as aforesaid."

The plaintiffs having charged negligence in their petition, the burden of proof is upon them to prove their cause of action as alleged.

"In reference to the duty of a railroad company, or master, to employes, the law requires the company to exercise reasonable care in furnishing suitable machinery and appliances for carrying on the business for which it employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections, tests and examinations at proper intervals, but the master is not responsible for hidden defects, which could not have been discovered by a careful inspection. The duty of the railroad company, in that respect, to its employes is discharged when, and only when, its agents whose business it is to supply such instrumentalities, exercise due care, as well in their purchase originally,
56 as in keep[ing] and maintaining them in their original condition, as to be reasonably and adequately safe for use by employes. A master employing a servant impliedly engages with him that the place in which he is to work, and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place, and the tools and machinery, and when he employs one, to enter into his service, he impliedly says to him that there is no danger in the place, the tools or the machinery, than such as is obvious and necessary. Of course, some places of work and some kinds of machinery, are more dangerous than others, but that is something that is inherent in the things itself, it is a matter of necessity and cannot be obviated. And within such limits, the master who provides the place, the tools and the machinery owes a positive duty to his employe in respect thereto. That positive duty does not go to the extent of the guaranty of safety, but it does require that reasonable precaution be taken to secure safety, and it matters not to the employe by whom that safety is secured, or the reasonable precautions therefor taken. He has the right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employe, or the latter's right to insist that reasonable precautions shall be taken to secure safety in these respects.

(Union Pacific Railway Co. vs. Daniels, 152 U. S., 688, 689, 690. See also Texas & Pacific Railway Co. vs. Archibold, 170 U. S. 672-3. Railway Co. vs. McDade, 135 U. S. 554; 175 U. S.)

The above are general rules regulating the duty of railway companies in supplying machinery and other appliances for use by their employes.

In reference to the case in hand your attention is directed to the statute of the Republic of Mexico, which provides as follows:

"The coaches and cars which enter into the make-up of a train, shall have the draw-heads of the same height, so that their centers will be opposite to each other."

In this case, you are instructed in conformity with the law of Mexico that it was the duty of the defendant to furnish deceased, William H. Slater, cars which entered into the make-up of the train about which he was engaged, having draw-heads of the same height, so that their centers should be opposite to each other; and you will determine from a consideration of the testimony whether the cars about which deceased was working at the time of his injuries, were constructed in accordance with the requirements [of] Mexican law. If such cars were constructed, in reference to their draw-heads, as required by the Mexican statute, then plaintiffs would not be entitled to recover in this case.

You are further instructed, that although the cars in question were defectively constructed, that is to say, that although they did not meet the requirements of the Mexican law in reference to the adjustment of their draw-heads, that fact alone would not render defendant liable in damages to plaintiffs, and you would still have the further question to determine whether the in-
57 juries of the deceased were the direct result of such defective cars. Hence to authorize a verdict in favor of plaintiff, you must be satisfied from the testimony: (1) that the cars, in reference to the draw-heads, were not constructed according to the requirement of the Mexican law, and (2) the injuries of the deceased resulted directly from such defective construction.

It is insisted by the defendant that the deceased was guilty of negligence which contributed to the injuries resulting in his death and on that account plaintiffs are not entitled to recover. In reference to this point, you are instructed that the law required the deceased to look out for his own safety, in order that harm should not come to him in the discharge of his duties. If, then, while performing his duties as brakeman, he failed to exercise that degree of care and caution, which a person of ordinary prudence would usually exercise under similar circumstances, and if from such want of care his injuries resulted, the plaintiff would not be entitled to recover in this suit. And you are further instructed that if in coupling the cars in question at the time deceased was hurt was dangerous, and the deceased knew of the danger incident to the business, and notwithstanding attempted to couple the cars and was hurt in the attempt, in such case the plaintiffs would be debarred of a recovery. The question, on the one hand, as to the construc-

tion of the cars and adjustment of draw-heads, and, on the other hand, as to the negligence of deceased, is remitted solely to your determination, and you will solve it to your own satisfaction from a consideration of all the facts and circumstances in evidence. You are the exclusive judges of the credibility of the witnesses and the weight to be attached to their testimony, and you will give it such weight as you think it entitled, under all the circumstances, to receive.

In civil suits like the present you are authorized to predicate your verdict upon a preponderance of evidence. If, in view of the testimony and the foregoing instructions, your verdict be in favor of plaintiffs, you will then proceed to consider the amount of damages to which they may be entitled. Upon this point you are instructed that in cases of this kind the damages are measured solely by the pecuniary injury to which the respective parties are entitled, including the loss of prospective damages. The measure of damages is not the same as where the party himself sues for injuries received, and recovers compensation for physical and mental suffering. See March vs. Walker, 48 Texas, 345.

The damages then must be measured by the pecuniary—money—injury to the respective plaintiffs. They are not entitled to recover anything for the mental pain which they may have suffered on account of the death of deceased, nor for any physical or mental suffering which deceased himself may have endured. If he had been simply injured and not killed, and brought suit himself the rule would have been otherwise for in that case the law would permit him to recover, if entitled to recover at all, damages for mental and physical pain and suffering. But in cases of this kind the damages, as before stated, must be measured by the pecuniary
58 standard, that is, the money value of the life of the deceased to the surviving wife and children; and the jury acting upon their sound and deliberate judgment, based upon facts and circumstances in evidence, and their knowledge, experience and sense of justice, may give such damages to the plaintiffs as they may think proportionate to the injury resulting to them from the death of the deceased. See 75 Texas, 67 and 69. And if your verdict be in favor of plaintiffs, you will divide the amount of damages awarded between them in such shares as you think each entitled to receive under the evidence and these instructions.

If, therefore, your finding be for the plaintiffs, you will render a verdict in the following form:

"We, the jury, find in favor of the plaintiffs, and assess their damages at ..... dollars.

"Of the amount of damages so found, we award to the plaintiff, Lena M. Slater, the sum of ..... dollars; to the plaintiff William F. Slater, the sum of ..... dollars; to the plaintiff Jesse R. Slater, the sum of .....; to the plaintiff Annie E. Slater, the sum of ..... dollars, and to the plaintiff Henry G. Slater, the sum of ..... dollars."

You, gentlemen, will fill up the blanks with the amounts which [you] may find and award to the respective parties.

If your verdict be in favor of the defendant, you will simply say: "We, the jury, find for the defendant."

The case is now in your hands. Take it and return such a verdict as will be responsive to the evidence and the instructions of the Court.

Whereupon the counsel for defendant, before the jury retired, requested the Court to give in charge to the jury each of the following special charges:

"(1) The jury are instructed that the said William H. Slater, for whose wrongful injury and death plaintiffs sue, in entering the service of defendant, assumed all the risks ordinarily incident to the said service, and in this connection you are instructed that all the risks assumed by him included all open visible defects."

"And if they believe from the evidence that William H. Slater, was injured while undertaking to remove a pinched pin and link, or a pin or links with knowledge of their condition, upon a moving car, then in that event you will find for the defendant."

"(2) The jury are instructed that if they believe from the evidence that William H. Slater, for whose injury and death plaintiffs sue was injured and killed by reason of the fact that the draw-heads of the cars to be coupled together were of uneven height, and that such condition was known to said William H. Slater, and that he, the said Wiliam H. Slater, was careless, or that he, the said Slater in trying to couple the said cars failed to use that
59 degree of care and caution usually adopted by a prudent person in the performance of said service then, and in that event, he was guilty of contributory negligence, and you will find for the defendant."

"(3) The jury are instructed that if they believe from the evidence that William H. Slater, for whose injury and death plaintiffs sue, was attempting to couple two cars together, and that said draw-heads of both had in them pinched pins and links, and that said physical condition was known to William H. Slater, and that in attempting to make such coupling under such conditions was inconsistent with that ordinary care and prudence that would be used by an ordinary prudent man under similar circumstances, then you will find for the defendant."

Each of said special charges having been written on separate pieces of paper and signed by counsel for defendant, and refused by the Court.

The evidence of J. N. Galbraith, F. A. Lattig, Cipriano Pedraza and Spencer, copied into and made a part of defendant's bill of exceptions No. 5, is hereby referred to and made a part of this bill.

Each of which special charges the Court refused to give in charge to the jury, to which action of the Court in refusing to give each of said special charges to the jury, the defendant, by its counsel, then and there in open Court, duly excepted, and here now tenders

this, its bill of exceptions No. 6, and prays the Court to sign, allow and approve, and order same filed as a part of the record in said cause, which is accordingly so done.

Signed March 27th, A. D. 1901. T. S. MAXEY, Judge.

(Indorsed:) No. 3. In the Circuit Court of the United States, Western District of Texas, Laredo Division. Lena M. Slater, et als. vs. Mexican National Railroad Co. Defendant's Bill of Exceptions No. 6. Filed March 28, 1901. D. H. Hart, Clerk, by Geo. B. Hufford, Deputy.

DEFENDANT'S BILL OF EXCEPTIONS NO. 7.

Filed March 28, 1901.

60 Lena M. Slater, et als.,
vs.
The Mexican National Railroad Company. No. 3.

Be it remembered that on the trial of this cause after the evidence set out in bill of exceptions No. 5 was introduced and before the jury retired the defendant moved the Court to charge the jury as follows:

In the United States Circuit Court for the Western District of Texas, at Laredo.

Lena M. Slater
vs.
The Mex. Nat. R. R. Co. No. 3.

The defendant respectively requests the Court to charge the jury as follows:

The jury are instructed that in the event you find in favor of the plaintiffs, then you will by your verdict find: first, what sum of money, if any, the said W. H. Slater, at the time of his death was contributing toward the support of his wife, and his said children (the plaintiffs) in this suit per month, specifying the amount in dollars and cents.

Second. You will find what proportion of said sum contributed by said W. H. Slater per month is to be paid to the said Lena M. Slater, and what proportion to each of said minor children, and in this connection you are instructed that said sums in the aggregate must not exceed the sum of money he was contributing to their support during his, W. H. Slater's, life and at and before his death.

THOS. W. DODD, Attorney for Defendant.

Refused: T. S. MAXEY, Judge.

The above charge asked specially in view of the following sections of said laws: Arts. 318, 319 and 320, read in evidence by agreement of parties, to-wit:

Art. 318. The civil responsibility that grows out of a homicide done without right (or justification) comprehends the payment of the indespensible expense of the burial of the body the expense and necessary charges made for the cure of the deceased, the damages that the homicide causes to the property of the deceased, and of the support not only of the widow, descendants and ascendants of the deceased, who were being suported by him, he being under legal obligation to do so, but also of the posthumous descendants that he may leave.

Art. 319. The obligation to furnish said support shall last during all the time the deceased might have lived if the homicide had not killed him, and that time shall be calculated by the judges according to the table at the end of this chapter, but taking into consideration the state of health of the deceased before the homicide was committed. As a limitation of this rule the obligation to give support shall cease. 1. At whatever time it shall
61 not be absolutely necessary for the subsistence of those entitled to receive it. 2. When those beneficiaries get married. 3. When the minor children become of age. 5. In any other case in which, according to the law the deceased, if alive would not be required to continue the support.

Art. 320. In order to fix the amount which should be given as the measure of support the liability of the party responsible for the killing shall be taken into consideration and the necessities and circumstances of the persons entitled to receive it.

Art. 325. Table of mortality or expectancy of life:

A. 10.....	Corresponded	40	80
" 15.....	"	37	40
" 20.....	"	34	26
" 25.....	"	31	34
" 30.....	"	28	52
" 35.....	"	25	72
" 40.....	"	22	89
" 45.....	"	20	05
" 50.....	"	17	23
" 55.....	"	14	51
" 60.....	"	11	05
" 65.....	"	09	63
" 70.....	"	07	58
" 75.....	"	05	87
" 80.....	"	04	60

Art. 325. Table of mortality or expectancy of life.

A. 85.....	Corresponded	02	00

Which special instruction the Court refused to give in charge to the jury, to which action of the Court, defendant then and there excepted and here now tenders this, its bill of exceptions No. 7,

and prays the Court to sign and approve and have same filed as a part of the record of said cause, which is accordingly done.

Signed March 27, 1901. T. S. MAXEY, Judge.

(Indorsed:) No. 3. In the Circuit Court of the United States in and for the Western District of Texas, at Laredo. Lena M. Slater, et als. vs. Mexican National Railroad Co. Defendant's Bill of Exceptions No. 7. Filed this 28th, day of March, 1901. D. H. Hart, Clerk, by Geo. B. Hufford, Deputy.

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62 ASSIGNMENTS OF ERROR.

Filed April 18th, 1901.

In the United States Circuit Court for the Western District of Texas, at Laredo.

Lena M. Slater, et als., Plaintiffs,
vs. No. 3.
The Mexican National R. R. Co., Defendant.
Assignments of Error.

Now comes the defendant, the Mexican National Railroad Company, by its attorneys, and assigns the following errors in the proceedings had in the trial Court, to-wit:

1st. That Hon. T. S. Maxey, the Judge presiding, erred in overruling defendant general and special exception to plaintiff's original petition, and especially in overruling exceptions numbered one, two, three, four and (5) five.

2nd. That the said Court erred in overruling defendant's special exception number two, filed on the .. day of March, 1901, to plaintiffs' original petition to the effect that it appeared from the laws of Mexico set up in plaintiffs' said petition that the right secured to plaintiffs to recover for personal injuries of W. H. Slater resulting in his death was in the nature of alimony or pension payable monthly or in installments, and that therefore the Courts of this country had no jurisdiction or power to enforce such a right.

3rd. That said Court erred in sustaining plaintiffs' special exception to defendant's amended original answer filed on the .... day of March, 1901, wherein defendant pleads that the Court should not undertake to exercise its jurisdiction, if any in fact exists, which defendant denies, to adjudicate upon the laws of Mexico set up as the basis of the damages sought to be recovered, because said laws are unlike and dissimilar to the laws of Texas in this, that the right secured under the laws of Mexico to certain representatives of deceased persons to recover damages, to-wit: of surviving husbands, wives, mothers, fathers and children, is the right of alimony or pension to be paid monthly and in installments, which right

ceases whenever the necessity for alimony or support no longer exists, such as a change of fortune, marriage of surviving wife and daughters, and when the boys arrive at the age of twenty-one years, which right and cause of action secured under the laws of Mexico is contrary to the public policy of Texas, in that the laws of Texas have provided no remedy for the enforcement of such a right. That the laws of Mexico, as pleaded by plaintiff, when construed in connection with provisions of the Mexican laws securing a right in surviving wives, mothers, fathers, husbands and children
63 for personal injuries resulting in death, to-wit: Arts. 211, 212, 213, 214, 217, 221 and 224 of the Civil Code of the Federal District and Arts. 1376 and 1377 of the Code of Civil Procedure, the laws of Mexico that govern, secures the right of alimony, or in the nature of a pension, and therefore secures a right unknown to the laws of Texas, and for the enforcement of which no law of Texas or of the United States has been provided, and therefore this Court has no jurisdiction to grant the relief prayed.

4th. The said Court erred in sustaining the exceptions of plaintiffs to defendants' offer to read in evidence to the Court and jury the testimony of Emilio Velasco, taken by deposition and returned into Court by consent of counsel, and which evidence rejected is in substance as follows, to-wit: That said Emilio Velasco is a native citizen of Mexico; that he is a lawyer in Mexico by profession and has been since January, 1860; that he was a graduate of the law school of the City of Mexico, graduating in January 1860; (4) that he was familiar with the laws of Mexico and of the States of Nueva Leon and Taumaulipas, in force now, and that were in force for two years past, touching the right of surviving wife and children to recover damages for personal injuries resulting in death of the husband and father; (6) that the right of the surviving wife and children in a civil suit for damages where no criminal proceedings had been had, and the defendant had been absolved, it was necessary as a precedent to a recovery that the Court trying the civil cause find that the killing or injury was a crime, as defined by the Criminal Code; (7) that the right was in the nature of alimony or pension to be paid in installment monthly for a period of time to be fixed by the Court; that the obligation to pay alimony to the wife and children, does not imply that of giving of a sum larger or smaller at once, but that of giving a pension. Alimony comprises meals, dress, habitation and assistance in case of sickness; and as regards minors, besides the necessary expenses of education of the party supported, and for the furnishing him a trade, art or profession, honest and suitable to the sex and personal circumstances; (8) that the party obliged to give alimony complies with this obligation by assigning a competent pension, or incorporating him into his family; (9) that the obligation to furnish alimony or support, as a consequence of civil responsibility, last all the time which the deceased ought to have lived, calculating that time according to the table of probabil-

ities which is a continuance of article 325 of the Penal Code, bearing in mind, however, the condition of the health of the deceased; but this obligation would cease at any time when it was not absolutely for the subsistence of the parties to receive it; therefore, that the obligation ceases from the moment in which the conditions of the fortune of the parties who receive alimony vary, allowing them to subsist without the necessity of alimony. It ceases with the wife and daughters when they marry, and with the sons when they arrive at twenty-one years of age; and it ceases when circumstances are produced that, according to law the obligation of giving would have ceased on part of the deceased if he had lived; (10) that civil responsibility is based upon an infraction of
64 the Criminal Code. It is the infraction that gives or engenders civil responsibility; (11) in case that the deed of fault or negligence, or to the omission which caused the injury, he is co-author of the offense or fault, and his representatives cannot recover; (12) that the wife and children have no right to any indemnification against a railway company on account of injuries from which resulted the death of the husband and father, when the accident in which said injury occurred was caused by the fault, or negligence, or omission of the one who suffered the injury, or if he contributed in any way with his fault, negligence or omission to the accident.

5th. The said Court erred in refusing in giving in charge to the jury defendant's special request No. 1, and which was as follows: "The jury are instructed to find a verdict for the defendant."

6th. The Court erred in refusing to give in charge to the jury defendant's special charge, in words as follows: "The jury are instructed that William H. Slater, for whose wrongful injury and death plaintiffs sue, in entering to the service of defendant, assumed all the risks ordinarily incident to said service, and in this connection you are instructed that the risks assumed by him include all open and visible defects. And if you believe from the evidence that the said William H. Slater was injured while undertaking to remove a pinched pin and link, or pin or links, with knowledge of their conditions upon a moving car, then in that event you will find for the defendant."

7th. The said Court erred in refusing to give in charge to the jury the following special instruction requested by the defendant, to-wit: "The jury are instructed that if they believe from the evidence that William H. Slater, for whose injury and death plaintiffs sue, was injured and killed by reason of the fact that the draw-heads of the cars to be coupled together were of uneven height, and that such condition was known to said William H. Slater, and that he, the said William H. Slater, was careless, or that he, the said Slater, in trying to couple the said cars failed to use that degree of care and caution usually adopted by a prudent person in the performance of said service, then in that event, he was guilty of contributory negligence, and you will find for the defendant."

8th. The said Court erred in refusing to give in charge to the jury defendant's special instruction in words as follows, to-wit:

"The jury are instructed that if they believe from the evidence that William H. Slater, for whose injury and death plaintiffs sue, was attempting to couple two cars together, and that said drawheads of both had in them pinched pins and links, and that said physical condition was known to said William H. Slater, and that in attempting to make such coupling under such conditions, was inconsistent with that ordinary care and prudence that would be used by an ordinarily prudent man under similar circumstances, then you will find for the defendant."

65 9th. The said Court erred in refusing to give in charge to the jury defendant's special instruction in words as follows, to-wit:

"The jury are instructed that in event you find in favor of plaintiffs, then you will by your verdict, find: first, what sum of money, if any, the said William H. Slater, at the time of his death, was contributing toward the support of his wife and his said children (plaintiffs in this suit) per month, specifying the amount in dollars and cents; second, you will find what proportion of said sum was contributed by said William H. Slater to the said Lena M. Slater, and what proportion to each of the minor children, and in this connection you are instructed that the said sum in the aggregate must not exceed the sum of money he contributing to their support during his, W. H. Slater's, life and at and before his death.'"

10th. The said Court erred in giving in charge to the jury that portion of its main charge in words as follows, to-wit:

"The damages then must be measured by the pecuniary—money—injury to the respective plaintiffs. They are not entitled to recover anything for mental pain which they may have suffered on account of the death of the deceased, or for physical or mental suffering which the deceased himself may have endured. If he had been simply injured, and not killed, and brought suit himself, the rule would have been otherwise, for in that case the law would permit him to recover, if entitled to recover at all, damages for physical and mental pain. But in cases of this kind damages, as before stated, must be measured by the pecuniary standard, that is the money value of the life of the deceased to the surviving wife and children. And the jury, acting upon their sound and deliberate judgment, based upon facts and circumstances in evidence, and their own knowledge, experience and sense of justice, may give such damages to the plaintiffs as they may think proportionate to the injury resulting to them from the death of deceased. See 75 Texas, 67 and 69."

Wherefore the Mexican National Railroad Company, plaintiff in error, prays that the judgment of the Circuit Court of the United States for the Western District of Texas, be reversed, and the cause

remanded for further proceeding, in accordance with the instructions of this Honorable Court.

MEXICAN NATIONAL RAILROAD COMPANY, Plaintiff in Error,
By THOS. W. DODD,
DENMAN, FRANKLIN & McGOWN,
Attorneys for Plaintiff in Error.

(Indorsed:) No. 3. The Mex. Nat. R. R. Co., Plaintiffs in Error, vs. Lena M. Slater, et als., Defendants in Error. Assignment of Error. Filed this 18th day of April, 1901. D. H. Hart, Clerk by Geo. B. Hufford, Deputy.

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66 PETITION FOR WRIT OF ERROR.

Filed March 18th, 1901.

In the United States Circuit Court for the Western District of Texas, at Laredo.

Lena M. Slater, et als., Plaintiffs,
vs. No. 3.
Mexican National R. R. Co., Defendant.
Petition for Writ of Error

To the Honorable Judges of the United States Circuit Court of Appeals, in and for the Fifth Circuit:

Now comes the Mexican National Railroad Company, defendant in the above styled and numbered cause, by its attorney of record, and complains that in the record and proceedings and in the verdict and in the judgment rendered in said suit between said defendants, as aforesaid, and the plaintiffs Lena M. Slater, who sues in her own behalf, and as next friend and natural guardian of her minor children, W. G. Slater, Jesse R. Slater Annie E. Slater and Henry G. Slater, plaintiffs, tried in the Circuit Court of the United States for the Western District of Texas, holding session at Laredo, at the March term thereof, 1901, in which judgment was rendered in favor of the plaintiffs, Lena M. Slater, W. G. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater, against the above named defendant, the Mexican National Railroad Company, on the 1st day of March, 1901, manifest error hath intervened to the great damage of defendant, the Mexican National Railroad Company.

Wherefore said defendant, the Mexican National Railroad Company, prays for the allowance of a writ of error and for such orders and process as may cause the same to be corrected by the

United States Circuit Court of Appeals for the Fifth Judicial Circuit, and as in duty bound petitioner will ever pray, etc.

Dated this 4th day of April, 1901.

THOS. W. DODD,
DENMAN, FRANKLIN & McGOWN,
Attorneys for Defendant.

Allowed April 18th, 1901.

T. S. MAXEY,
Judge Presiding.

(Indorsed:) No. 3. The Mexican National R. R. Co., Plaintiffs in Error, vs. Lena M. Slater, et als. Petition for Writ of Error. Filed this 18th day of April, 1901. D. H. Hart, Clerk, by Geo. B. Hufford, Deputy.

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67 The United States of America, Fifth Judicial Circuit.

The President of the United States, to Lena M. Slater, W. G. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater—Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, within thirty days from the date hereof, pursuant to writ of error sued out and filed in the Clerk's office of the Circuit Court of the United States for the Western District of Texas, at Laredo, in the cause wherein Lena M. Slater, W. G. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater are plaintiffs, and the Mexican National Railroad Company is defendant, to show cause if any there be, why the judgment rendered against the said The Mexican National Railroad Company, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable T. S. Maxey, Judge of the District Court of the United States for the Western District of Texas, this 18th day of April, in the year of our Lord one thousand nine hundred and one.

Signed this, the 18th day of April, A. D. 1901.

[Seal] T. S. MAXEY, United States Judge.

Attest: D. H. HART, Clerk.

By GEO. B. HUFFORD, Deputy.

Marshal's Return. (17)

Service of this citation is hereby accepted for all purposes, this the 18th day of April, A. D. 1901.

KELLER & WILLIAMS,
E. A. ATLEE,

Attorneys for Lena M. Slater, W. G. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater.

[Indorsements:] No. 3. Mex. Nat. R. R. Co., plaintiff in error, vs. Lena M. Slater, et als, defendant in error. Citation. Marshal's Return. Filed this 18th day of April, 1901. D. H. Hart, Clerk, by Geo. B. Hufford, Deputy.

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68 UNITED STATES OF AMERICA, ss.

The President of the United States, to the Honorable the Judges of the Circuit Court of the United States for the Western District of Texas—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Lena M. Slater, W. G. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater, plaintiffs, and The Mexican National Railroad Company, defendant, a manifest error hath happened, to the great damage of the said The Mexican National Railroad Company, defendant, as by its complainant [complaint] appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within thirty days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of April, in the year of our Lord one thousand nine hundred and one. D. H. HART,

Clerk of the United States Circuit Court, Western District of Texas,

[Seal] By GEO. B. HUFFORD, Deputy.

Allowed this, the 18th day of April, A. D. 1901.

T. S. MAXEY, United States Judge.

[Indorsements:] No. 3. Mex. Nat. R. R. Co., plaintiff in error, vs. Lena M. Slater, et als., defendants in error. Writ of Error. (16) Filed this 18 day of April, 1901. D. H. Hart, Clerk, by Geo. B. Hufford, Deputy.

69

BOND FOR ERROR.

Filed April 18th, 1901.

Know all men by these presents, that we, The Mexican National Railroad Company, as principal, and Geo. W. Brackenridge, as sureties, are held firmly bound unto Lena M. Slater, W. G. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater in the full and just sum of ten thousand and five hundred dollars, to be paid to the said Lena M. Slater, W. G. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater, or their certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ..... day of April, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a term of the United States Circuit Court for the Western District of Texas, at Laredo, in a suit pending in said Court between the said Lena M. Slater, for herself, and as next friend of W. G. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater as plaintiffs, and the Mexican National Railroad Company, defendant, on the law side of said Court, said cause being numbered 3, a judgment was rendered against the said The Mexican National Railroad Company, defendant, in the aggregate sum of seven thousand dollars, and for all costs of Court, and the said The Mexican National Railroad Company, defendant in said cause, having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and citation directed to the said Lena M. Slater, W. G. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater, citing and admonishing them to be and appear before the United States Court of Appeals for the Fifth Circuit to be holden at New Orleans, Louisiana, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said, The Mexican National Railroad Company, shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its writ of error and plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of:

THE MEXICAN NATIONAL RAILROAD CO.,
By THOS. W. DODD, its Atty. of Record, [Seal]
GEO. W. BRACKENRIDGE, [Seal]
FRED. HERFF, JR. [Seal]

Approved this, the 18th day of April, A. D. 1901.

T. S. MAXEY, United States Judge.

(Indorsed:) No. 3. Mex. Nat. R. R. Co., plaintiff in error, vs. Lena M. Slater, et als., defendants in error. Bond. Filed this 18th day of April, 1901. D. H. Hart, Clerk, by Geo. B. Hufford, Deputy.

70 CLERK'S CERTIFICATE.

The United States of America, Western District of Texas.

I, D. H. Hart, Clerk of the Circuit Court of the United States for the Western District of Texas, do hereby certify that the foregoing sixty-nine pages contain a true and correct copy of the proceedings had in cause No. 3, entitled Lena M. Slater, et als., vs. The Mexican National Railroad Company, as the same appear on file and of record in this office. And I further certify that the original writ of error and original citation in error are included in said transcript, and numbered 68 and 67 respectively.

Witness my hand and the seal of said Court at office in the City of Laredo, this the 25th day of April, A. D. 1901.

D. H. HART, Clerk.

[Seal] By GEO. B. HUFFORD, Deputy.

[Extract from Minutes, November Term, 1901.]

January 14, 1902.

83 The Mexican National Railroad Company
vs. No. 1063.
Lena M. Slater, et al.

This cause was regularly called this day and submitted to the Court after argument by Mr. Leroy G. Denman and Mr. Thos. W. Dodd for plaintiff in error, and by E. A. Atlee for defendant in error.

[Extract from Minutes, November Term, 1901.]

April 22, 1902.

The Mexican National Railroad Company
vs. No. 1063.
Lena M. Slater, et al.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the Western District of Texas, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be and the same is hereby reversed, and this cause is remanded to said Circuit Court with directions to sustain special exception No. 2, filed by the defendants in said Court on March 18, 1901, and to dismiss plaintiffs' action.

It is further ordered and adjudged that the defendants in error Lena M. Slater, William F. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of said Circuit Court.

Per McCORMICK, Circuit Judge.

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85 UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

The Mexican National Railroad Company, Plaintiffs in Error,
vs. No. 1063.
Lena M. Slater, et als., Defendants in Error.

PETITION FOR REHEARING.

Having carfully examined the opinion of this Honorable Court, we think that, with propriety, we may ask the Court to consider wiether this case be not one in which it will be proper to grant a rehearng to the defendants in error on the following grounds, to-wit:

1. Because holding that both the parties to the record and the subject-matter in controversy are within the jurisdiction of the Court, is to recognize the existence of a right to substantial relief which our courts are powerless to protect, grant or enforce.

2. Because jurisdiction having attached to the parties and the subject-matter, the fact that the same result may not be reached under our rules of law regulating the procedure, as if the remedy had been pursued in Mexico, does not lead to the conclusion that injustice may be done to the defendant, and does not require the Court to decline to adjudicate the rights of the parties.

(Higgins v. Cen. N. E. Railroad, 155 Mass., 181.)

86 3. Because the testimony of Emilio Velasco does not show what construction the courts of Mexico place upon the statutes of that country, but is only in substance a re-iteration of the statute law of that country as pleaded, together with a statement on his part that the right of plaintiffs is in the "nature of alimony or pension to be paid in installments monthly, for the periods of time fixed by the court," and a further statement as to when the obligation to furnish alimony ceases.

4. Because the Court in considering the testimony of Emilio Velasco and giving such weight thereto, in the opinion of the Court, as should have been given to it on the trial, deprives plaintiffs of a valuable right, viz: to impeach, attack, or rebut the same by the testimony of others eminent and learned in the laws of Mexico; and in preventing plaintiffs from showing (if such be a fact) that the judgment of Mr. Velasco may have unduly, but honestly, inclined

to the interests of a client; and because the Court improperly attached such consideration to the evidence of Mr. Velasco as would be accorded to the decisions of the courts of Mexico.

5. Because the Court improperly holds that the chapter of the Mexican law set out by plaintiffs, on the subject of alimony, relates directly to the subject-matter in controversy; when the only purpose such chapter could properly serve is to enable the Court to find therefrom that the deceased (William H. Slater) was under legal obligation to support his wife and children.

6. Because the question of jurisdiction as decided is one of first impression, and one of great importance to litigants on the Mexican border in cases pending; and, in view of a trial already had on the merits, plaintiffs should not be deprived of the advantage of such trial, when by a rehearing the case could be certified to the Supreme Court and such advantage saved to the plaintiffs in the event the Supreme Court should hold in their favor on the question of jurisdiction.

87 7. Because, if the Court correctly holds that the testimony of Emilio Velasco was improperly excluded, the rehearing should be granted so that in event it should be finally held by the Supreme Court that it is within the power of our courts to adjudicate the cause, it may be reversed and remanded for trial, wherein such testimony may be admitted together with such rebutting testimony as may be available to the plaintiffs on the same subject.

8. Because it would appear from the opinion of the Court that an action at law would lie in favor of the male minors for whose benefit the action is instituted and the action should not abate as to them, the Court being competent to afford relief to all entitled to relief in such action, while those entitled to equitable relief are relegated to their appropriate remedy.

Wherefore defendants in error respectfully ask that a rehearing be granted; that the cause be certified to the Supreme Court on the question of jurisdiction; and that if the cause must be finally reversed on the present record, that it be remanded for trial.

Respectfully submitted,

E. A. ATLEE,
C. A. KELLER,
MASON WILLIAMS,
Counsel for Defendants in Error.

I, C. A. Keller, of counsel for defendants in error herein, do hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that the same is not interposed for delay.

C. A. KELLER.

(Endorsed:) United States Circuit Court of Appeals, Fifth Circuit. The Mexican Railroad Company, Plaintiffs in Error,

versus Lena M Slater et als. Denfendants in Error. No. 1063. Petition for Rehearing. E. A. Atlee, C. A. Keller, Mason Williams, Counsel for Defendants in Error. U. S. Circuit Court of Appeals. Filed May 9, 1902. Charles H. Lednum, Clerk.

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88 [Extract from Minutes, November Term, 1901.]

May 31, 1902.

Mexican National Railway Company
vs. No. 1063.
Lena M. Slater, et al.

Ordered that the petition for rehearing filed in this cause be, and the same is hereby denied.

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89 UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT.

November Term, 1901.

Filed April 22, 1902.

No. 1063.

The Mexican National Railroad Company, Plaintiff in Error,
vs.
Lena M. Slater, et als., Defendants in Error.

Error to the Circuit Court of the United States for the Western District of Texas.

Before Pardee, McCormick and Shelby, Circuit Judges.

This was an action by the defendants in error, Lena M. Slater and William F. Slater, Jesse R. Slater, Annie E. Slater, and Henry

G. Slater, minors, surviving wife and children of William H. Slater, deceased, against the Mexican National Railroad Company (the plaintiff in error) to recover damages for the death of the deceased. The petition is in the usual form until it reaches the ninth paragraph, and then it is in the words and figures following:

"IX. Plaintiffs further allege that by the laws of Mexico which now exist and existed and were in force at the time and place of the happening of the killing of William H. Slater, through the defendant's negligence as aforesaid, they, the plaintiffs, have had the right of action against the defendant for their damages, and they say that the following were and are the laws of Mexico, applicable to this case, out of which the said right of action grew, and by virtue of which the same now exists in the said Republic of Mexico, to-wit:

From the Federal Constitution of the Mexican United States.

90 "Art 72. Congress has power * * * (22) To enact laws governing the general lines of communication, and governing postoffices and mails."

"Art. 97. The Federal Courts have jurisdiction: (1) Of all questions growing out of the execution and application of the Federal Laws, except when the application of the law only affects interests of individuals, in which case the local Judges and Tribunals of the State shall entertain jurisdiction."

From the Penal Code of Mexico.

"Art. 4. A crime is a voluntary infraction of a penal law, doing that which it prohibits, or neglecting to do that which it commands.

"Art. 5. A misdemeanor is the infraction of police regulations or proclamations and good government.

"Art. 6. There are intentional crimes, and crimes resulting from neglect.

"Art. 11. Negligent crimes exist: (1) Where an act is done, or a duty omitted, which, although lawful in itself, is not so by reason of its consequences, if the accused fails to provide against the consequences, through negligence, want of reflection or care, by not making proper investigations, by not taking necessary precautions or through unskillfulness in any art or science, the knowledge of which is necessary in order that the act done may not result in injury. Unskillfulness is not punishable when he who does the act does not profess the art or science necessary to be known, and acts when impelled by the gravity and urgency of the case. * * * (3) Where the question relates to an act which is punishable solely by reason of the circumstances under which it is done, or by reason of a circumstance personal to the party aggriev-

ed; if the accused is ignorant of such circumstance, through not having previously made the investigation which the duty of his profession or the importance of his case demands."

Pen. Code Bk. 2. "Civil Liability in Criminal Matters."

91 "Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses."

"Art. 304. Reparation comprehends: Payment of all damages caused to the injured party, his family or a third person for the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, a proximate, and inevitable consequence."

"Art. 305. Indemnization imports: The payment of damages, that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an act of omission by which a formal, existing and not merely possible right is attacked, and for the value of the fruits of the thing usurped and already consumed, in the case in which the same should be done conformably with civil right."

"Art. 306. The condition required by the two preceding articles, that the damages and injuries should be actual, shall not prevent that the indemnization of subsequent damages and injuries be exacted by a new suit, when they shall have accrued; if they proceed directly from, and a necessary consequence of, the same act or omission from which resulted the previous damages or injuries."

"Art. 307. The payment of judicial expenses solely embraces those absolutely necessary, which the injured party incurs for the purpose of investigating the act or omission which causes the criminal proceeding and to avail himself of his rights in such proceedings or in the civil suit.

"Art. 308. The civil responsibility can not be declared except at the instance of the party entitled to recover."

92 "Art. 309. The Judges who adjudicate upon the civil responsibility shall be controlled by the provisions of this title, so far as its provisions extend; on other questions, they shall follow, according to the nature of the suit, the provisions of the civil or of the commercial laws which may be in effect at the time of the happening of the act or omission causing the civil responsibility."

"Art 310. The right to civil responsibility forms a part of the estate of a decedant and descends to his heirs and successors, provided it be not the case of the following article, or that it arise from injury or defamation, and that, the offending person having been able in the life-time to bring his suit, he neither did so nor directed his heirs to sue; in such case the offense shall be understood as remitted.

"Art. 311. The action to enforce civil responsibility demanding support of a person guilty of homicide is personal, and belong exclusively to the persons named at the end of article 318 as directly damaged. Consequently such action forms no part of the estate of the deceased, nor is it extinguished, although the latter pardon the offense in life."

"Art. 318. The civil responsibility that grows out of a homicide done without right (or justification) comprehends the payment of the indispensible expenses of the burial of the body, the expenses and necessary charges made for the cure of the deceased, the damages that the homicide causes to the property of the deceased, and of the support not only of the widow, descendants and ascendants of the deceased, who were being supported by him, he being under the legal obligations to do so, but also to the posthumous descendants that he may leave."

"Art. 319. The obligation to furnish support shall last during all the time that the deceased might have lived if the homicide had not killed him, and that time shall be calculated by the Judges according to the table at the end of this chapter, 93 but taking into consideration the state of the health of the deceased before the homicide was committed. As a limitation to this rule the obligation to give support shall cease. 1. At whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it. 2. When those beneficiaries get married. 3. When the minor children become of age. 4. In any othr case in which, according to law, the deceased, if alive, would not be required to continue the support."

"Art. 320. In order to fix the amount which should be given as the measure of support, the ability of the party responsible for the killing shall be taken into consideration and the necessities and circumstances of the persons entitled to receive it."

"Art. 325. * * * Table of mortality or expectancy of life.

A	10.....	Corresponded	.....40.80
"	15.....	"	.....37.40
"	20.....	"	.....34.26
"	25.....	"	.....31.34
"	30.....	"	.....28.52
"	35.....	"	.....25.72
"	40.....	"	.....22.89
"	45.....	"	.....20.05
"	50.....	"	.....17.23
"	55.....	"	.....14.51
"	60.....	"	.....11.05
"	65.....	"	.....09.63
"	70.....	"	.....07.58
"	75.....	"	.....05.87
"	80.....	"	.....04.60
"	85.....	"	.....02.00

Federal Civil Code, Chap. IV.

94 "Art. 205. The obligation to give support is reciprocal; he that gives support has at the same time the right to ask it."

"Art. 206. Married people in addition to the general obligation imposed by matrimony, have that of giving support in cases of divorce and others designated by law."

"Art. 207. Fathers are obliged to support their children. If it should be impossible for the parent to do so, or should they be unable to do so, the obligation falls upon other ascendants by both lines of ascendancy who are nearest of kin.

"Art. 208. The children are obliged to give support to their parents. If it is impossible for the children to so, or they are unable to do so, then those descendants next in kin are obliged to do so.

"Art. 211. The support comprehends eating, dress, habitation and assistance in case of sickness."

"Art. 212. In regard to minors support it comprehends in addition to the necessary expenses for the primary education of the party entitled to support, and to furnish him some calling, art or profession, honest and adequate to his sex and personal circumstances."

"Art. 214. The support should be proportioned according to the abilities of those who have to give it, and the necessities of those who have to receive it."

"Art. 220. The assurance of the support may consist in a mortgage, bond or deposit of sufficient amount to cover the support."

"Art. 225. The right to receive can not be renounced nor is it an object of transfer or assignment."

Pen. Code Bk. 2.

"Art. 313. The Judges who take cognizance of suits based upon civil responsibility shall endeavor that the amount and terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following article shall be observed: * * * *

"Art. 321. In cases of blows or wounds, from which the injured party does not remain crippled, lamed or deformed, he shall have the right that the responsible party pay all his expenses of
95 cure, the damage he may have suffered, and that which he may fail to gain during the time which, in the opinion of competent persons, he may not be able to do the work by which he subsists. But it is essential that the inability to work should be the direct result of the wounds or blows, or be a cause which is the immediate effect of such blows or wounds."

"Art. 322. If the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which he shall recover, and can properly devote himself to other and different work, which may be lucrative and appropriate to his education, habits, social position and physical constitution, the civil

responsibility shall be reduced to paying him the sum which his liability to earn in his new employment falls short of his daily earnings in his former occupation."

"Art. 323. If the blows or wounds cause the loss of any member not indispensible for work, or the person wounded or struck remain otherwise crippled, lame or deformed, by that circumstance he shall have the right not only to the damages and injuries, but also to the sum which the Judge may determine as extraordinary indemnity, considering the social position and sex of the person and the part of the body remaining crippled, lamed or deformed."

"Art. 324. The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability."

"Art. 325. The provisions of the foregoing articles for computing the civil responsibility for wounds or blows shall be applied to all other cases where, in the violation of a penal law, a person may cause the illness of another, or may have placed him under a disability to work."

"Art. 326. No person shall be charged upon a civil liability upon an act or omission contrary to a penal law unless it
96 be proven; that the party sought to be charged usurped the property of another; that without right he caused, by himself or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority."

"Art. 327. Whenever any of the conditions of the preceding articles are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability."

"Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 326 and 327, it is an indispensable condition that the act or omissions of the clerks or servants causing the liability shall occur in the service for which they were employed."

"Art. 331. Under the conditions of the preceding article, those liable are * * * * railroad companies."

"Art. 363. Limitations: The various actions by which civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked shall be extinguished according to the terms and in the manner provided by the civil code of the commercial code, according to the nature of the demand and the subject-matter treated of."

"Art. 364. Amnesty shall not extinguish the civil responsibility, nor the actions to exact it, nor the legal rights which third persons may have acquired. Nevertheless, when the responsibility may not, yet have been made effective, and the demand is not for restitution, but for reparation of damages, for indemnity for injuries, or for the payment of judicial expenses,

the guilty person shall remain free from such obligations only when it is so declared in the amnesty and they are expressly left to the charge of the public treasury."

"Art. 365. A pardon shall in no case extinguish civil
97 responsibility nor the actions to enforce it, nor the legal rights which third persons may have acquired."

"Art. 366. Limitation is interrupted by criminal proceeding until final judgment is pronounced. This done the term of limitation commences to run anew."

. Transitory Law: Pen. Code.

"Art. 26. Until it is determined in the new code of procedure what Judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following rules shall be observed: * * * (5) Actions to enforce the civil liability may be brought before the Court of civil jurisdiction, whether or not the criminal proceedings has been commenced; but while the latter is pending the proceeding in the former shall be stayed."

From the Federal Civil Code.

"Art. 9. Against the observance of the law, disuse, custom or practice to the contrary cannot be alleged."

"Art. 20. When a judicial controversy can be decided neither by the text nor the natural meaning or spirit of the law, it must be decided according to the general principles of right, taking into consideration all the circumstances of the case."

"Art. 21. In cases of conflict of rights and the absence of express law for the special case, the controversy shall be decided in favor of him who seeks to avoid damages, and not in favor him who seeks to obtain a profit. If the conflict should be between equal rights, or rights of the same species, it shall be decided by observing the greatest equality possible between the parties."

"Art. 1095. Limitation bars in three years * * * * (8) Civil responsibility for injuries, whether done by word or by writing, and that which arises from damage caused by persons or animals, and which the law imposes upon the representatives of such persons or the owners of the animals."

98 Acts of Congress of December 15, 1881.

"Art. 1. The executive shall regulate the service of railroads, telegraphs and telephones constructed, or which may in the future may be constructed, upon Mexican territory, according to the following basis: (1) Railroads, telegraphs and telephones which in the Federal District and territory of Lower California unite together two or more municipalities, or Federal District and territory of Lower California with one or more states; those which communicate two or more states with each other; those which touch

any point in the territorial boundary line of the republic and foreign countries, or run parallel therewith within a region of twenty leagues, are known as general lines of communication within the meaning of fraction 22 of article 72 of the constitution. (2) These general lines of communication and their branches shall be subject exclusively to the Federal legislature, executive and judicial powers, in their respective spheres, in all cases where any of the following matters are involved: * * * * (g) Construction and repair of the works. Crimes committed against the security or integrity of the works or against the operation of the lines. (h) Security of the same works for which the companies, through delays or obstructions, carelessness or fault in the service or for accidents or mishaps in the operation."

From the Regulations for the Construction, Maintenance and Operation of Railroads.

"Art. 52. The coaches and cars which enter into the make-up of a train shall have the draw-heads of the same height, so that their centers will be opposite to each other."

"Art. 53. No car of whatever kind shall form a part of the make-up of a train, unless the same shall have been previously inspected very carefully."

"Art. 99. The company shall be responsible for the moving of all trains on its road."

"Art. 184. Companies (railroad) are liable for all faults and accidents which occur through tardiness, negligence, imprudence or want of capacity of their employes."

"Art. 208. All violations of this law which companies
99 (railroad) commit shall be subject to punishment by the administration of a fine up to five hundred dollars, which the department of public works shall assess, reserving always the right of individuals through indemnity and the liabilities which the companies may incur through criminal acts or omissions committed by them."

Plaintiffs furtner allege that by reason of the general statutes of the State of Texas and by virtue of the general princi-
106 ples of right and justice and of the laws of Mexico hereinbefore mentioned, they had and now have a right of action for their damages against (the defendant) in the Republic of Mexico, and the same now exists in said country as well as in the State of Texas, and in the United States of America. And they say that the acts of negligence upon the part of the defendants, its agents, servants and employes were wrongful and actionable as has been hereinbefore shown by the plaintiffs in the Republic of Mexico, at the time of the killing complained of, and are now so, and they say that the same were then and are now wrongful and actionable in the United States of America, and in the State of Texas. And plaintiffs say that by reason of the negligent kill-

ing of the said William H. Slater, they have suffered damages in the sum of thirty thousand dollars ($30,000.00).

Wherefore, premises considered, plaintiffs pray that defendant be cited to answer this petition and that they have judgment for their said damages and that said damages be apportioned among the plaintiffs as they may be found to share therein, and that they have judgment for all costs of suit and for general and special relief.

The petition was filed on November 17, 1900. On December 4, 1900, the defendant (the plaintiff in error) answered by demurrer in substance as follows:

That the petition shows no cause of action—

(1) Because it appears that the wrong which resulted in the death of William H. Slater, occurred in the Republic of Mexico.

(2) The laws of Mexico are not similar or analagous to the laws of Texas (designating the points of dissimilarity).

(3) It appears that the plaintiffs' right to recover damages in Mexico, if any, depends wholly upon the infraction of the
101 penal statute of the Republic of Mexico, which has no extra-territorial effect, and the Court has no jurisdiction to determine such matters or to adjudge damages based upon a penal statute of a foreign government.

(4) It does not appear that all the parties authorized under the Mexican law to maintain an action for the recovery of damages are parties to this action. The action is therefore not authorized by the Texas statute, and if, entertained, will subject the defendant to a multiplicity of suits, contrary to the well-established policy of Texas.

(5) The laws of Mexico as pleaded are so unlike and dissimilar to the laws of Texas, that this Court should not undertake to administer the same under the doctrine of national or interstate comity.

These demurrers were all overruled. On March 18, 1901, the defendant by leave of the Court, amended its answer, by which it excepted further and submitted that it affirmatively appears from the plaintiffs' petition that the right of survivors to recover damages for personal injuries resuling in death is alimony or pension, payable in installments, and is therefore so dissimilar from the laws of Texas and the common law that this Court can not administer or enforce said laws and rights. And not waiving its plea to the jurisdiction, but specially urging the same, as well as its general and special exceptions, the defendant pleaded, (1) a gener-
al denial, and (2) that the right secured un-
102 der the laws of Mexico to certain representatives of deceased persons to recover damages, to-wit: of surviving husbands, wives, mothers, fathers and children, is the right of alimony or pension, to be paid monthly and by installments, which right ceases whenever the necessity for alimony

or support no longer exists, such as a change of fortune, marriage of the surviving wife and daughters and when the boys arrive at the age of twenty-one years, which right and cause of action secured under the laws of Mexico is contrary to the public policy of Texas, as the laws of Texas have provided no remedy for the enforcement of such a right, and the Courts, neither in law nor in equity, have power or authority to create a remedy for such enforcement; that the laws of Mexico as pleaded by the plaintiffs, when construed in connection with other provisions of the Mexican laws securing the right of recovery in surviving wives, mothers, fathers, husbands and children for personal injuries resulting in death, to-wit: Articles 211, 212, 213, 214, 217, 221 and 224 of the Civil Code of the Federal District, and with Articles 1376 and 1377 of the Code of Civil Procedure, the laws of Mexico that govern, secure a right of alimony, or in the nature of a pension, and therefore secure a right of recovery unknown to the laws of Texas, and for the enforcement of which no law of Texas or of the United States has been provided, and the Court has no jurisdiction to grant the relief prayed.

To this amended answer the plaintiffs filed their first supplemental petition and demurred to the matters
103 pleaded in the defendant's answer, because the same constitutes no defence to the cause of action, and especially because the laws referred to relating to alimony and pension, namely, the articles of the Civil Code mentioned, are provisions of the laws of Mexico regulating matters growing out of the marriage relation and involving the duties and obligations of parties to the marriage contract and of parents and children, and such provisions do not show a material or substantive difference, or any difference, between the laws of Texas and the United States and Mexico as to the nature of the right of action claimed by the plaintiffs to exist under the laws of Mexico; nor do such provisions show or tend, to show that the laws of Mexico on the subject of damages for injuries resulting in death are contrary to the public policy of Texas or the United States. And, further, because the provisions of the laws referred to, namely, Articles 1376 and 1377, Code of Procedure, relate to a proceeding for the purpose of obtaining a decree for temporary alimony, and in no sense can they be the foundation for a defense to the action. In aid of which exceptions the plaintiffs filed with their replication, as Exhibits "A" and "B," and made a part thereof, the following, namely: A translation of Chapter IV of Book I, Title V, of the Civil Code of Mexico, which treats of alimony (de los Alimentos), which Chapter includes the articles mentioned in the
104 amended answer; also a translation of certain articles of Chapter II, of Book III, Title I, of Mexico Code of Procedure, relating to temporary alimony, including the articles mentioned in said amended answer.

Exhibit "A."

Chapter IV, of Book I, Title V—Concerning Alimony.

Art. 205. The obligation to furnish alimony is reciprocal, the one who furnishes alimony has in his turn the right to demand it

Art. 206. Parties to the marriage contract, in addition to the general obligation which the marriages imposes, are bound for alimony in cases of divorce and in other cases provided by law.

Art. 207. Parents are bound to give alimony to their children. If there be no parents or they be not able to give alimony, the obligation falls on the other relations on both sides in the nearest ascending grade.

Art. 208. Children are bound to give alimony to their parents. If there be no children, or if they are not able to give alimony, the nearest relations in the descending grade are bound.

Art. 209. If there be no relations in the ascending or descending grade, or if they are not able to give alimony, the obligation falls on the brothers and sisters of both parents; on those of the mother alone, if there be none of the father, and on those of the father if there be none of the mother.

Art. 210. Brothers and sisters are bound to give alimony to their younger brothers and sisters only until they are 18 years of age.

Art. 211. Alimony comprehends food, clothing, dwelling place and attendance in sickness.

Art. 212. Respecting minors, alimony includes in addition, the expenses necessary for the primary education of the dependent, and to prepare him for some occupation, art or profession, honest and suitable to his sex and personal circumstances.

105 Art. 213. The one bound to supply alimony fulfills his obligation by assigning a pension sufficient to support the dependent, or by taking him into his family.

Art. 214. Alimony should be in proportion to the estate of the one bound, and to the necessities of the one who receives it.

Art. 215. If the obligations to receive alimony falls upon several, and all are able to give, the judge shall apportion the amount among them according to their means.

Art. 216. If only some of these are able, the amount of alimony shall be apportioned among them; and if one only shall have the means he alone shall comply with the obligation.

Art. 217. The obligation of supplying alimony does not include that of endowing the children, nor that of providing them with capital to prosecute the business, are [art] or profession for which they may have been fitted.

Art. 218. The right to demand that alimony be made secure exists in favor of: I. The person entitled to alimony. II. The relative in ascending grade who may have him (the person entitled thereto) under his parental control: III. The guardian. IV. The brothers and sisters. V. The public department.

Art. 219. If the person who demands security of alimony in the name of the minor, cannot and does not wish to represent him in Court, the Judge shall appoint a temporary guardian.

Art. 220. The security shall consist of a mortgage, bond or deposit of an amount sufficient to cover the alimony.

Art. 221. The temporary guardian shall give security for the annual value of the alimony. If he should control any fund designated for that purpose he must give legal security for it.

Art. 222. Where the father enjoys the use of the property of the child, the value of the alimony shall be deducted from it (the income) if it is sufficient to cover it (the alimony). On the contrary, where the income is not sufficient the difference
106 shall be (a charge) on account of the father.

Art. 223. If the necessity of the dependent proceeds from bad conduct the Judge, having knowledge of the cause, may diminish the sum fixed as alimony, placing the one at fault, if necessary, under care of competent authority.

Art. 224. The obligation to supply alimony ceases: I. When the one bound lacks the means of compliance. II. When the dependant is no longer in need of alimony.

Art. 225. The right to receive alimony cannot be renounced, nor can it be subject to compromise between the parties.

EXHIBIT "B."

Chapter 11, of Book 111, Title 1.

Civil Procedure. Temporary Alimony.

Art. 1372. In order to decree temporary alimony to one who has the right to exact it, it is necessary:

I. To make complete proof of the right under which it is asked.

II. To prove proximately at least, the means of the one who should give alimony.

III. To make sufficient proof of the urgent necessity for temporary alimony.

Art. 1373. The proof required under paragraph 1 of the preceding article shall be the last will, the contract or executory instrument which contains the obligation to give alimony; the contract will have to be in form of a public writing.

Art. 1374. When alimony is asked on the ground of consanguinity, the documents should be presented which prove the interested party to be within the cases provided in article 207 to 210 and 3324 and articles of the civil code relating thereto.

Art. 1375. When husband or wife asks alimony, the act or certificate of marriage must be presented.

Art. 1376. After compliance with the provisions of the pre-

ceding articles, the Judge, if he believes the right has been established, shall designate the amount of alimony and
107 shall adjudge it, directing it to be secured months in advance in all cases.

Art 1377. Immediately on adjudging temporary alimony, the first monthly payment shall be exacted of the one liable for it.

The counsel for the respective parties agreed in open court as follows:

It is agreed by counsel upon both sides that the translation of the laws of Mexico, as set up in plaintiff's petition, and which translations are herewith filed and marked Exhibit "A" and "B" for identification with the records in this case, are correct translations of the laws they purport to be translations of, taken from the respective codes in said petition mentioned.

And it is further agreed that the laws described in defendant's original answer and plaintiff's supplemental petition are the laws of Mexico having application to this case.

Thereupon the Court overruled the demurrer of the defendant and sustained the demurrers of the plaintiffs, to which ruling the defendant duly excepted. The trial proceeded; and after the evidence, including proof of the laws of Mexico had been closed, the judge on his own motion, charged the jury in part as follows:

"The damages then must be measured by the pecuniary—money—injury to the respective plaintiffs. * * In cases of this kind the damages * * * must be measured by the pecuniary standard, that is, the money value of the life of the deceased to the surviving wife and children; and the jury, acting upon their sound and deliberate judgement, based upon facts and circumstances in evidence, and their knowledge, experience and sense of justice, may give such damages to the plaintiffs as they may thing proportionate to the injury resulting to them from death of the deceased. See 75 Texas, 67 and 69.

The jury returned the following verdict:

"We, the jury, find in favor of the plaintiffs,
108 and assess their damages at seven ($7,000) thousand dollars. Of the amount of damages so found we award to the plaintiff, Lena M. Slater, the sum of $2,691.00; to the plaintiff William F. Slater $153.00; to the plaintiff Jesse R. Slater, $717.00; to plaintiff Annie E. Slater $1,346.00; to plaintiff Henry G. Slater, $1,793.00." On which it was "ordered, adjudged and decreed by the Court that the plaintiffs do have and recover of and from the defendant, the Mexican National Railroad Company, the full sum of seven thousand dollars, with interest thereon from this date at the rate of six (6) per cent

per annum. It is further ordered, adjudged and decreed by the Court that of the said sum of seven thousand dollars the plaintiff Lena M. Slater do have and recover the sum of two thousand six hundred and ninety-two dollars ($2,692.00); the plaintiff William F. Slater the sum of four hundred and fifty-three dollars ($453.00); the plaintiff Jesse R. Slater the sum of seven hundred and seventeen dollars ($717.00); the plaintiff Annie E. Slater one thousand three hundred and forty-six dollars ($1,346.00), and the plaintiff Henry G. Slater one thousand seven hundred and ninety-three dollars ($1,793.00), with interest on the said sums, respectively, from this day at the rate of six (6) per cent per annum."

109 McCormick, Circuit Judge, after stating the case, as above, delivered the opinion of the Court.

The grounds of the defendant's demurrers and of its special plea are these: (1) That the death occurred in the Republic of Mexico, and not within the jurisdiction of the Circuit Court. (2) That under the Mexican laws the parties who may prosecute the suit are different from the parties who may prosecute a like suit in the State of Texas, and that the laws of Mexico pleaded and relied upon by the plaintiffs are so far different in other particulars from the laws of Texas as to put the case outside of the jurisdiction of the Circuit Court. (3) That the right of the plaintiffs to recover depends solely upon the construction of a penal statue of Mexico which has no extra-territorial effect. (4) That under the laws of Mexico the right of survivors to recover damages for personal injuries resulting in death is alimony or pension, payable in installments, and is therefore so dissimilar from the laws of Texas or the common law that this court can not administer or enforce those laws and the plaintiffs' rights thereunder.

The parties to this suit are citizens of the United States, and all of the plaintiffs are citizens of Texas and inhabitants of the district in which the suit was brought, while the sole defendant is a corporation organized under the laws of the State of Colorado, and has constructed and operates a line of railroad to the City of Laredo, in the district and at a point where the Circuit Court is held, and where also the defendant has a duly authorized and recognized agent upon whom process may be served; and the defendant being thus an inhabitant of the district, has duly appeared.

The statutes of Mexico creating the plaintiffs' right place the acts and omissions charged against the defendant to support their claim of right in the class of negligent crimes; but it can not be contended that the act belongs to that class of criminal laws which can only be enforced by the Courts of the country where the offense was committed, for it gives a civil action to recover damages for a civil injury. It is such an injury as would not have supported an action at common law, for it was early held and has become settled law that at common law the death of a human being could

110 not be complained of as an injury in a civil

court. As the right to compensation in such cases is one of recent creation, it is dependent solely upon the statute of the country where the injury is inflicted from which the death results. But when an act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, the wrong-doer may be held liable in any Court to whose jurisdiction he can be subjected by personal process, or by voluntary appearance. Wherever, by either common law or the statute of the country, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties. Dennick vs. Railroad Company, 103 U. S., 11.

We have seen that the foreign law here involved does not belong to the class of criminal laws which can only be enforced by the Courts of the foreign Country. The right created by those laws is not contrary to the public policy in the State of Texas, in which State the Circuit Court to which this writ of error issued is held. Texas Rev. Stats. (1895), Arts. 3017, 3027. It is not contrary to abstract justice or to pure morals, nor calculated to injure the State of Texas or the United States or their citizens. We have already shown that the Circuit Court has jurisdiction of all of the parties to this action.

What we have said sufficiently disposes of the first and third of the grounds of error as stated in the opening of this opinion. The first clause of the second ground becomes immaterial in view of our conclusion as to the fourth ground, which substantially includes the last clause of the second, and hence there remains for discussion only the fourth ground of error, assigned as numbered in our opening statement.

On the subject of jurisdiction, therefore, it remains to inquire only whether, consistently with our own forms of procedure and law of trials we can do substantial justice between the parties. From the nature of our system of national judicature, and from the nature of the case, there is no general law or statute of the United States prescribing the forms of procedure and the
111 law of the trial in such cases in the Circuit Court other than the statute which requires that the forms and modes of procedure in civil causes in the Circuit Court shall conform as nearly as may be to the forms and modes of procedure existing at the time in like cases in the Courts of record of the State within which the Circuit Court is held. (Revised Statutes, Sec. 914.) As we have seen, "in cases of other than penal actions, the foreign law, if not contrary to our public policy or to abstract justice or pure morals, or calculated to injure the State or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can

do substantial justice between the parties. If the foreign law is a penal statute, or if it offends our own policy or is repugnant to justice or to good morals, or is calculated to injure the State or its citizens, or if we have not jurisdiction of the parties who must be brought in to enable us to give a statutory remedy; or if, under our forms of procedure, an action here can not give a substantial remedy, we are at liberty to decline jurisdiction." Higgins vs. Central New Eng. Railroad, 155 Mass., 176-180, quoted with approval in Huntington vs. Attrill, 146 U. S., 657. We must, therefore, look somewhat closely to the Texas law and practice thereunder preparatory to a comparison of that law with the laws of Mexico to determine whether the Circuit Court in an action at law can give a substantial remedy and do substantial justice between the parties in this cause.

Article 3027 of the Revised Statutes of Texas (1895) provides: "The jury may give such damages as they may think proportioned to the injury resulting from such death, and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict."

The learned judge of the Circuit Court who presided on the trial of this case sat in the trial of the case of Hall vs. Galveston, H. & S. A. Ry. Co., 39 Fed., 21, and in his instruction to the jury in that case, stated the Texas law thus: "It is necessary for the plaintiff, in cases of this kind, to show a damage of a pecuniary nature; yet such damages are not to be given merely in reference to the loss of a
112 legal right, but may be calculated with reference to the reasonable expectation which the plaintiff had, resulting from his condition, and the disposition and ability of his son, during his life, to bestow upon him pecuniary benefit as of right, or in obedience to the dictates of filial duty without legal claim." In Missouri Pacific Ry. Co. vs. Lehmberg, 75 Tex., 67, 68, which the trial judge cites in his charge in the instant case, we find the Texas law announced thus: "While the law does not, in this character of action, intend to give compensation for anything but pecuniary loss by estimating the money value of the life of the relative, and while it necessarily results that regard must in each instance be paid to such facts and conditions as cast light upon the subject, it yet must be admitted that the inquiry is not intended to be narrowed down by the law to a result that can be exactly accounted for by the facts in evidence. Every parent and husband has for his wife and children a pecuniary value beyond the amount of his earnings by his labor or vocation." That value may to some but not to every extent, be susceptible of allegation and proof, and to the extent that it can be alleged and proved it ought to be done. The difficulties of proof are known to the law maker. In some States an attempt has been made to remove them to some extent by placing limits to the amount that may be

recovered. In establishing such rules the idea of making compensation in each instance for the pecuniary value of the lost life is necessarily abandoned. When no amount is fixed by law and no rule is prescribed for making the calculation upon facts capable of exact ascertainment, it necessarily follows, we think, that the lawmaker intended that, having reference as far as practicable to conditions existing at the time of the death, juries, from their knowledge, experience and sense of justice should fix and assess the proper sum." In an earlier case, Railway vs. Kuehn, 70 Tex., 382, it is said at page 587: "That pending the suit the widow married again does not preclude her right of action." And in Gulf, Colo. & S. P. Ry. Co. vs. Younger, 90 Tex., 387, on certified questions duly propounded to the Supreme Court to obtain its rulings on the points stated, that court answered: "To the first question we answer that evidence of the marriage of plaintiff Younger, after the death of his wife, on account of which he
113 sought to recover damages, was properly rejected by the court." And in the argument in the opinion it is stated: "If the plaintiff's wife was killed through the negligence of the defendant, he then lost the value of her life as a wife, and the fact that her place has been supplied by a subsequent marriage does not in any manner operate to mitigate the damages for which the wrong-doer was responsible."

Looking only to the sections of the statutes put in evidence, we see that the civil liability imposed by the Mexican law obliges the wrong-doer to indemnify the injured party "for the violation of a right which is formal, existing and not simply possible, and this imports the payment of damages, that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an act or omission by which a formal, existing and not merely possible right is attacked." Arts. 301, 304, 305, Penal Code, Bk. 2, Civil Liability in Criminal Matters. "The civil responsibility that grows out of a homicide done without right (or justification) comprehends * * * the support not only of the widow, descendants and ascendants of the deceased, who were being supported by him, he being under legal obligations to do so, but also the posthumous descendants that he may leave. The obligation to furnish support shall last during all the time that the deceased might have lived if the homicide had not killed him, and that time shall be calculated by the Judges according to the table at the end of this chapter, but taking into consideration the state of the health of the deceased before the homicide was committed. As limitation of this rule, the obligation shall cease, (1) at whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it; (2) when those beneficiaries get married; (3) when the minor children become of age; (4) in any other case in which, according to law, the deceased, if alive, would not be required to continue the support." (Arts. 318, 319, *Idem.*)

The articles of the statute law of Mexico put in evidence in this case appear to stand together, and, though taken from different books and different chapters of the laws as passed and published, to have a direct relation to the same general subject, and to define and limit the rights which they create. Counsel for the plaintiff in error contend that the general and special demurrers and exceptions to the respective pleadings of the parties necessarily involve and require, (1) the proper construction of the laws of Mexico touching the nature of the right and damages secured to surviving widows and children; (2) the power and authority of the Circuit Court of the United States to administer these laws and enforce the right secured by them to the plaintiffs; and (3) as practically preliminary to the other two, the manner of proving and construing the laws of a foreign country.

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The law of Mexico being that of a foreign country, of which our courts do not take judicial notice, could only be proved as a fact, and if not proved in the trial court can not be taken judicial notice of by this court on this writ of error. Huntington vs. Attrill, 146 U. S., 657. The plaintiff in error contends that under the agreement of counsel the translations of the statutes as set out in the plaintiffs' petition and in Exhibits "A" and "B," constituting as it does all of the testimony in relation to the laws of Mexico which was admitted by the trial judge in no manner negatives or tends to negative the existence of other written or unwritten laws of Mexico having application to the issues in this case and that, in further proof of the laws of Mexico as practically construed and enforced in that republic, it tendered the testimony of Emilio Velasco, a man learned in the laws of Mexico, taken by deposition, duly verified and authenticated and returned into court, which testimony was as follows:

"(1) That the said Emilio Velasco was a native citizen of Mexico; (2) that he was a lawyer in Mexico by profession, and had been since January, 1860; (3) that he was a graduate of the law school of the City of Mexico, graduating in January, 1860; (4) that he was familiar with the laws of Mexico and the States of Nueva Leon and Tamaulipas, in force now and that were in force for two years past, touching the right of the surviving wife and children to recover damages for personal injuries resulting in the death of the husband and father; (6) that the right in a surviving wife and children in a civil suit for damages, where no criminal proceedings had been had and defend-

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ant had been absolved, it was necessary as a precedent to a recovery that the court trying the civil cause find that the killing or injury was a crime as defined by the penal code; (7) that the right was in the nature of alimony or pension to be paid in installments monthly, for periods of time fixed by the court; that obligation to pay alimony to the wife and children does not imply that of giving a sum larger or smaller at once, but of giving a pension.

Alimony comprises meals, dress, habitation and assistance in case of sickness; and as regards minors, besides the necessary expenses for the education of the party supported, and for furnishing him a trade, art or profession, honest and suitable to sex and personal circumstances; (8) that the party obliged to give alimony complies with this obligation by assigning a competent pension, or by incorporating him into his family; (9) that the obligation to furnish alimony or support as a consequence of civil responsibility lasts all the time that the deceased ought to have lived, calculating the time according to the table of probabilities, which is a continuance of Article 325 of the Penal Code, bearing in mind, however, the condition of the health of the deceased, but that this obligation would cease at any time when it is not absolutely necessary to the subsistance of the parties who receive it. Therefore the obligation ceases from the moment in which the condition of fortune of the parties who receive alimony vary, allowing them to subsist without the necessity of the alimony. It ceases with the wife and daughter when they marry, and with sons when they become twenty-one years of age; and it ceases when circumstances are produced that, according to law, the obligation of giving would have ceased on part of deceased if he had lived; (10) that civil responsibility is based upon infraction of the Penal Code. It is the infraction of the Penal Code that gives or ingenders civil responsibility. (11) In case the injured party has contributed to the deed or fault or negligence or to the omission which caused the injury, he is co-author of the offence or fault, and his represtatives cannot recover; (12) that the wife and children have no right to any indemnification against a railway company on account of injuries from
116 which resulted the death of the husband or father when the accident in which the said injury occurred was caused by the fault or negligence or omission of the one who suffered the injury, or if he contributed in any way with his fault, negligence or omission to the accident."

To the reading of this deposition counsel for the plaintiffs (the defendants in error), objected on the ground that the statutory law of Mexico as pleaded, is best proved by the statutes themselves, and that the statutes having been offered in evidence, the depositions of witnesses as to what is the law is inadmissible, which objection the court sustained. And the defendant duly excepted. Counsel for the plaintiff in error contend that this ruling assumes that the statutory law of Mexico is all of the law in cases of the character of the action at bar affecting the right of recovery, in that it assumes that it is incompetent to offer testimony of one learned in the laws of a foreign country as to what the law is, whether written or unwritten, and that it assumes that it is incompetent to offer testimony in the nature of expert evidence as to the proper construction of a statute of a foreign country and written in a foreign tongue. Undoubtedly the usual and bet-

ter mode of authenticating foreign written laws is by a copy proved to be a true copy. But unwritten laws must ordinarily be proved by parol evidence. Greenleaf on Ev., sec. 488. Counsel further insists that the trial court in admitting only the copies of the certain statutes offered, and refusing the aid of parol evidence, fell into a mistake as to the laws of Mexico which determine the rights of the plaintiff's and the defendants in this case. In support of this contention they refer to the instruction of the trial judge to the jury, in which he uses this language: "In cases of this kind the damages are measured solely by the pecuniary injury to which the respective parties are entitled, including the loss of prospective damages." And this language is reiterated as follows: "In cases of this kind, the damages, as before stated, must be measured by the pecuniary standard, that is, the money value of the life of the deceased to the surviving wife and children; and the jury,

117 acting upon their sound and deliberate judgment, based upon facts and circumstances in evidence and their knowledge, experience and sense of justice, may give such damages to the plaintiffs as they may think proportionate to the injury resulting to them from the death of the deceased."

A most eminent text writer, in a work of standard authority, has said: "No tribunal on earth, however learned, could hope by any degree of diligence to master the laws and processes and remedies of all other nations and the qualifications and limitations properly belonging thereto." The same writer has said: "In regard to the merits and rights involved in actions, the law of the place, where they originated, is to govern. But the forms of remedies and the order of the judicial proceedings are to be according to the laws of the place where the action is instituted without any regard to the domicile of the parties, the origin of the right, or the country of the act." And, again: "There are many questions, however, which may arise as to what are and what are not matters properly belonging to the remedy, and what are and what are not matters properly belonging to the merits. Many cases of this sort may be found collected and discussed by foreign jurists upon the peculiarities of their own jurisprudence. But they could not be made intelligible to a lawyer under the common law, without occupying a space in explanation wholly disproportionate to their importance in a treatise like the present." (Story, Conflict of Laws, secs. 557, 558, 563.) The statutes of Mexico were conceived and are expressed in the Spanish language, which is the vernacular tongue in Mexico. They are addressed to those having full knowledge of the Spanish idiom. They are addressed also to persons instructed in or charged with a knowledge of the unwritten laws, customs and usages of that people, and, like the cases referred to by Mr. Story which could not be made intelligible to a lawyer under the common law, without laborious explanations, these statutes thus conceived and addressed, while they must be construed by whatever court is charged with the duty of executing them, may be more rightly and safely construed with the

aid of the testimony of competent witnesses instructed in these laws, customs and usages, the idiom of the language and the unreported decisions of their enlightened domestic courts, which, we are informed, do not occupy their decisions by the announcement of judicial opinions, if they are not, as is probably the case, forbidden by law to do so. The deposition of the witness having been offered to prove as a fact the law of the foreign country, was addressed to the court to aid him in his rulings during the progress of the trial and in giving his instruction to the jury, and if he erroneously refused to receive and consider it, it is still such proof of the foreign law offered in the trial court that it can be taken judicial notice of by this court on writ of error. Without the aid of this testimony we would find it difficult to construe the limitations expressed in the latter part of Article 319, above quoted, and especially the second one of those limitations; and while we probably would from the nature of the case and from a careful consideration of the satute pleaded and proved have reached the conclusion that limitation 2 must relate to female beneficiaries, whether minors or not, and that limitation 3 relates to minor children of the male sex, we should have felt the need of the further proof which is offered to be supplied by the deposition of the learned Mexican lawyer. We conclude that the learned trial judge erred in sustaining the objection to the introduction of this proof, and, for the reason already given, we will take judicial notice of it on this writ of error. Without requoting here or attempting further to analyze the provisions of the statute law of Mexico set out in the statement of the case and to some extent considered in the foregoing part of this opinion, it appears clear to us from a careful comparison of the different sections of the statutes and a careful consideration of the deposition of the Mexican lawyer that the right created by the Mexican laws is the right to a continuing support during the periods of time that support would have been due from the deceased, and in the amount that it would have been due, proportioned to his ability to give it and the necessities of those who had the right to receive it. Any judgment that may be rendered against the defendant must as studiously respect and inforce its rights as it does the rights of the plaintiffs. Limitations placed on the right of the plaintiff are for the protection and just treatment of the party bound. The provisions of the Mexican law which we are considering seem to regard and relate to not only the paramount interest of the individual parties to the transactions, liabilities and reparations, but also to the interest of the public in having the support due to the beneficiaries so extended that it will continue through the period for which it is provided. The provisions of the Mexican statute on this subject have in view the declaring and conserving the interest of Mexican citizens, and where, as in this particular case, the beneficiaries are citizens of the United States, our laws, State and National, as

administered in our courts, may be deemed adequate to authorize and secure the preservation of the rights of the beneficiaries and the protection of the interest of the public, and may yet be not adequate to the due enforcement of the limitations put upon the plaintiff's rights for the just protection of the limitations put upon the plaintiff's right for the just protection of the party charged. Possibly in the Texas state courts, where the distinction between law and equity does not exist, or at equity in the courts of the United States, a decree might be passed fixing the liability of the defendant and retaining control of the parties to the suit and of the subject-matter so as to enforce that liability, with the limitations provided in the interest of the defendant. It is difficult to conceive what judgment at law the circuit court could render that would protect the interest of the defendant in the limitations put by the Mexican law on the plaintiff's right. It may be that, under our system of judicature, the jury, taking the place of the judges in the Mexican system, might under proper instructions, on full proof, and aided as Mexican trial judges are aided, by their own experience and knowledge of affairs, be able fairly and justly to assess in a lump sum the value of the right secured to the male beneficiaries, (the case before us does not require that question to be decided now, and on it we express no opinion), but if in a case where only male beneficiaries are parties there may be no insuperable difficulty in the way of our enforcement of the right secured by the Mexican law, it is difficult to conceive how the most learned trial judge could instruct a jury so as to enable them, on any possible condition of proof, to fix a present sum which would give female beneficiaries their due and give they only their due. Before the fact of their marriage shall have occurred, on what basis established by law or by human experience can the proximate date when those beneficiaries will get married be fixed by the jury or by any other human intelligence?

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The Texas law provides that "an action for actual damages on account of injuries causing the death of any person may be brought by all of the parties entitled thereto, or by any one or more of them for the benefit of all." (Arts. 3017 and 3022.) It is clear, therefore, that the rights of all entitled to damages on account of injuries causing the death of any person must be considered and settled in one action against the wrongdoer, and that in the case where some of the beneficiaries are males and some of them females, the same difficulty is presented as occurs in a case where female beneficiaries alone are interested and are parties plaintiffs. The learned and distinguished counsel who appeared in this court for the defendants in error, and who submitted an oral argument and a printed brief, presents in his second proposition in his printed brief, "that conditions which may arise and under which, according to the law of Mexico, civil liabilities for damages for injuries resulting in death

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will cease, may constitute defensive matter, the effect of which to bar the remedy rather than to extinguish the right of action. But no such contingencies have been pleaded. The court is not called upon to construe the law relating thereto." This proposition, in our opinion, is not sound. The limitations we have been considering relating to the female beneficiaries directly affect the plaintiff's right, and are not merely defensive matter to be availed by the one bound after the marriage of the female beneficiaries shall have occurred.

We therefore conclude that the right of the survivors (the plaintiffs) to recover damages for personal injuries resulting in the death of William H. Slater is alimony, or pension, payable in installments for uncertain and indeterminate periods, dependent upon conduct of beneficiaries and conditions impossible to forecast, and is therefore so dissimilar from the laws of Texas and the common law that the circuit court in an action at law cannot administer the same and enforce the rights of the plaintiffs so as to do substantial justice between the parties.

It is unnecessary to notice any of the other questions presented by the assignment of errors. The view we have taken of the case requires that the judgment of the circuit court shall be

Reversed, and the cause remanded with direction to that court to sustain special exceptions No. 2, filed by the defendant on March 18, 1901, *and to dismiss the plaintiff's action.*

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123 UNITED STATES CIRCUIT COURT OF APPEALS.
For the Fifth Circuit.

I, Charles H. Ledlum, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing 123 pages numbered from A to 122, inclusive, contain a true copy of the transcript of the record and all proceedings, including the opinion of the court, in the case of the Mexican National Railroad Company vs. Lena M. Slater, et al., No. 1063, as the same remains upon the files and records of said United States Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 10th day of November, A. D. 1902. CHARLES H. LEDNUM,

Clerk of the United States Circuit of Appeals for the fifth Circuit.

124 In the United States Circuit Court of Appeals, Fifth Circuit.

THE MEXICAN NATIONAL RAILROAD CO., Plaintiff in Error,
vs.
LENA M. SLATER ET AL., Defendants in Error.

It is hereby stipulated by and between the plaintiff in error, acting through its attorneys of record, and the defendants in error, acting through their attorneys of record, that the certified transcript of the record of the proceedings in the U. S. circuit court of appeals, filed in the Supreme Court of the United States by petitioners at the time of the filing of their petition for writ of certiorari, can be taken as a return to the writ of certiorari issued by the Supreme Court, and the filing of a further certified transcript is hereby waived.

THE MEXICAN NATIONAL RAILROAD COMPANY,
By DENMAN, FRANKLIN & McGOWN,
Its Attorneys of Record.

LENA M. SLATER,
W. G. SLATER,
JESSE R. SLATER,
ANNIE E. SLATER, AND
HENRY G. SLATER,
By KELLER & WILLIAMS,
Their Attorneys of Record.

The foregoing has the following endorsements, to wit:
The Mexican National Railroad Co. *v.* Lena M. Slater *et al.* Stipulation as to return to certiorari. Filed 15 day of Jan'y, 1903. Charles H. Lednum, clerk of the United States circuit court of appeals.

A true copy. Attest with seal this the 15th day of January, 1903.
[Seal United States Circuit Court of Appeals, Fifth Circuit.]
CHARLES H. LEDNUM, *Clerk.*

125 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Being informed that there is now pending before you a suit in which The Mexican National Railroad Company is plaintiff in error, and Lena M. Slater, W. G. Slater, Jesse R. Slater, Annie E. Slater,

and Henry G. Slater, are defendants in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the western district of Texas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme
126 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of December, in the year of our Lord one thousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

127 In the United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, clerk of said court, do hereby certify that I received the within writ on the 15th day of January, A. D. 1903, and, whereas, the attorneys for the parties therein named have, by a stipulation in writing filed in my office on this day, agreed that the certified transcript of the record of the proceedings in the United States circuit court of appeals filed in the Supreme Court of the United States, by petitioners, at the time of the filing of their petition for certiorari, can be taken as a return to the writ of certiorari issued by the Supreme Court, and the filing of a further certified transcript is hereby waived, therefore, in compliance with said writ and by direction of the judges of this court, I have made and attached hereto a certified copy of said stipulation as a return to the within writ.

Seal United States Circuit Court of Appeals, Fifth Circuit.

Witness my official signature and the seal of said court this the 15th day of January, A. D. 1903.

CHARLES H. LEDNUM, *Clerk.*

[Endorsed:] File No. 18,741. Supreme Court of the United States. No. 162, October term, 1903. Lena M. Slater *et al. vs.* The Mexican National Railroad Co. Writ of certiorari and return. Filed Jan'y 19, 1903.

In the

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903

LENA M. SLATER et al.,
Petitioners,
vs.
MEXICAN NATIONAL RAILROAD CO.,
Respondent.

No. 943

Petition for Writ of Certiorari.

O. A. KELLER,
MASON WILLIAMS,
E. A. ATLEE,
Attorneys for Petitioners.

E. P. Sparrow, Printer, 108 Main Plaza, San Antonio, Texas.

IN THE

Supreme Court of the United States.

NOVEMBER TERM, 1902.

Petition for Writ of Certiorari requiring the Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court, for its review and determination, the case of the Mexican National Railroad Company, plaintiff in error, versus Lena M. Slater et als., defendants in error.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The petition of Lena M. Slater and her minor children, William F. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater, respectfully shows to this Honorable Court as follows:

(1) Your petitioners being citizens of the State of Texas, residing in Webb county, on the 17th day of November, 1900, brought their action at law in the Circuit Court of the United States for the Western District of Texas at Laredo, against the Mexican National Railroad Company, a corporation created under the laws of the State of Colorado, to recover damages on account of the death of William H. Slater, caused by the negligence of the railroad company. Lena M. Slater is the surviving wife, and the minors the children of the deceased, William H. Slater.

In addition to the usual allegations of negligence causing the injuries which resulted in Slater's death, which occurred in the State of Tamaulipas, in the Republic of Mexico, your petitioners set out the statute laws of Mexico, and alleged that under the

laws set out they had a right of action for such damages. They alleged that they "were each dependent for their support and maintenance upon the earnings of deceased, upon which fact and upon other considerations, particularly the legal obligation of the deceased to support them, and his love and affection for them, they base their expectations of pecuniary aid from said deceased. * * * That they reasonably expected to receive, and in fact would have received in money from the earnings of deceased thirty thousand dollars."

(2) The defendant was duly cited, appeared and answered.

(3) The defendant by demurrer in the trial court questioned the jurisdiction of the Circuit Court on the ground "that it affirmatively appears from plaintiff's petition that the right of survivors to recover damages for personal injuries resulting in death is alimony or pension, payable in installments, and is, therefore, so dissimilar from the laws of Texas, and the common law that this court cannot administer or enforce said laws and rights." (This was special exception No. 2, filed March 18th, 1902.)

There were other exceptions substantially to the same effect. They were all overruled.

(4) The answer of defendant included a general denial; an allegation that the laws of Mexico are unlike and dissimilar to the laws of Texas, and that the right under the laws of that country is to recover alimony or pension, a right unknown to the laws of Texas, for the enforcement of which no law of Texas, or of the United States has been provided, and that, therefore, the court is without jurisdiction to grant the relief prayed for. Contributory negligence was also pleaded in defense.

(5) The trial on March the 20th, 1901, was before a jury, and resulted in a verdict for the plaintiffs, apportioning to each a specific sum of money, the several sums aggregating $7,000.00, and judgment was entered accordingly.

(6) That the case was taken by the Mexican National Railroad Company, on writ of error, to the Circuit Court of Appeals for the Fifth Circuit, at New Orleans, where, on April 22nd,

1902, it was reversed and remanded, with direction to the trial court to sustain special exception No. 2, filed by the defendant on March the 18th, 1901, and to dismiss the plaintiff's action.

The conclusion reached by the Honorable Circuit Court of Appeals, leading to the reversal, is thus expressed: "That the right of the survivors to recover damages for personal injuries resulting in the death of William H. Slater is alimony, or pension payable in installments for uncertain and indeterminate periods, dependent upon conduct of beneficiaries and conditions impossible to forecast, and is, therefore, so dissimilar from the laws of Texas, and the common law that the Circuit Court in an action at law can not administer the same and enforce the rights of the plaintiffs so as to do substantial justice between the parties."

(7) Your petitioners asked for a rehearing in the said Circuit Court of Appeals, praying that the same should be granted and that the case might be certified to the Honorable Supreme Court on the question of jurisdiction, which was denied on May 31st, 1902.

A certified copy of the entire record of the said case in the said Circuit Court of Appeals is herewith furnished as a part of this application in conformity with Rule 37 of this Honorable Court, relative to cases from Circuit Court of Appeals, and the same is marked "Exhibit A."

(8) Your petitioners are advised and believe that the said judgment of the said United States Circuit Court of Appeals in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for review and determination under and in conformity with the provision of the Sixth section of the Act of Congress, entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes," approved March 3rd, 1891. The jurisdiction of the Circuit Court depending entirely upon the parties to the suit being citizens of different States, viz.: Texas and Colorado, the judgment is made final in the said Circuit Court of Appeals by the said act.

(9) The border between this country and the Republic of Mexico is extensive. The two countries are connected by great carrier systems—arteries of international trade and commercial intercourse. Some of these systems are citizens of this country. One of them (the defendant in this case) is chartered under the laws of the State of Colorado. Citizens of the United States seek and obtain employment on this and other such roads, and are occupied in the line of such employment within the limits of both countries, rendering service partly in one and the other, while hundreds of our citizens daily are transported by these carriers between the two countries, both on business and pleasure. Thriving towns and cities are along the border of the two countries, whose inhabitants mingle freely together and enjoy the most intimate social and business relations. The two nations at such places are connected by electric street cars; and electric light companies, having plants and places of business on this side of the Rio Grande, extend their wires to the other side and furnish power and light to parties residing over there.

The existence of such relations, it is respectfully submitted, makes the question of the proper adjudication of this case one of gravity and importance, and of international concern.

Its gravity and importance is greatly increased by the fact that its correct solution involves the proper construction of the laws of a foreign country which have not before this been construed. Many cases are now pending in the United States Circuit Courts in Texas awaiting the final solution of the question, adding force to the contention that this is a proper case for the exercise of the power of this Honorable Court in granting the writ of certiorari. Ex-parte Lau Ow Bew., 141 U. S., 583.

(10) The case at bar was decided in the said Circuit Court of Appeals against the contention of your petitioners to-wit: (1) That under the laws of Mexico a clearly defined right of action exists for damages arising from injuries resulting in death caused by negligence; and that a proper construction of Articles 301, 304, 311 and 318 of the penal code of Mexico leads to the conclu-

sion that such right of action is given. (2) That support of the widow and children of deceased, payment of which may be exacted from a railroad company under the laws of Mexico, is not alimony in the statutory meaning of that term, but is made an element of damages, to be considered in estimating the amount for which a recovery may be had; and that its payment may be enforced in the courts of law of this country, without reference to the procedure of the Code of Mexico to enforce the payment of alimony. (3) That the limitations prescribed in Article 319 of the Penal Code of Mexico relate to matters of fact which may be pleaded to abate, or bar the action (the contingency having arisen) and which affect the remedy rather than the right of action—such limitations being to the effect that the obligation to furnish support shall cease, (a) when not absolutely necessary for the subsistence of those entitled to receive it, (b) when the beneficiaries get married, (c) when the minor children become of age, (d) when the deceased, if alive, would not be required to continue the support.

As to these limitations your petitioners' contention is in effect that, while in the courts of Mexico a cause of action for damages growing out of injuries causing the death of a person would abate, if it be shown that any of the contingencies mentioned in Art. 319 existed, yet that the action would not abate under the laws of this country.

In the case of B. & O. Railroad Co. vs. Jay, 173 U. S., 226, the following question was referred to the Supreme Court of the United States: "Does an action pending in the Circuit Court of the United States sitting in Ohio, brought by the injured person as plaintiff to recover damages for injuries sustained by the negligence of the defendant in Indiana, finally abate upon the death of the plaintiff in view of the fact that, had no suit been brought at all, the cause of action would have abated both in Indiana and Ohio, and that, even if suit had been brought in Indiana, the action would have abated in that State?" The answer to this question, it is respectfully submitted, sustains your petitioners' contention. The court, in giving a negative answer, say: "It is

scarcely necessary to say that the determination of the question of the right to revive this action in the name of Hervey's personal representative is not affected in any degree by the fact that the deceased received his injuries in the State of Indiana. The action for such injuries was transitory in its nature, and the jurisdiction of the Ohio court to take cognizance of it upon personal service or on the appearance of the defendant to the action can not be doubted. Still less can it be doubted that the question of the revivor of actions brought in the courts of Ohio for personal injuries is governed by the laws of that State, rather than by the law of the State in which the injuries occurred."

It would seem that the case cited is stronger than the case at bar, in this: The contingency of plaintiff's death had actually arisen, and it was sought to apply the law of Indiana; while in the case at bar, none of the contingencies prescribed in the law of Mexico had arisen, and it was not contended that there was not a perfect, subsisting cause of action under the Mexican law. It was, therefore, contended that the Circuit Court of Appeals could not properly consider the question, the contingencies prescribed in the article mentioned not having arisen. Had any of the facts existed or occurred after institution of the suit, it would seem that the case cited would indicate the course to be taken, viz: That the cause should proceed to judgment according to the law of the forum.

Your petitioners are advised and believe that the said Circuit Court of Appeals has erred in denying the relief for want of jurisdiction or power in the courts of law of this country, and especially in the courts of law of the United States to hear, determine and adjudicate the said case; that said Circuit Court of Appeals has erred in holding the remedy of your petitioners to be alimony, or pension, recoverable as such under the laws of Mexico, and that for lack of a similar remedy in our country, your petitioners can not obtain relief in an action at law in the Circuit Court of the United States; that the said Circuit Court of Appeals has erred in giving a construction to the laws of Mexico suggested by

the statements contained in a deposition taken in the case, but which was not admitted on trial; and thus were your petitioners deprived of an important and valuable right, viz.: To meet such testimony by evidence in rebuttal; and the statements so considered lead to an unreasonable construction of the laws of Mexico, not shown to be the construction placed upon those laws by the courts of that country.

(11) Where a railway company, by negligence, has brought itself under obligation to furnish support as damage for injuries resulting in death, it does not also have the right to demand support. The obligation as to alimony under the law of Mexico is reciprocal. "The one who furnishes alimony has in his turn the right to demand it." (Art. 205.) The recovery, therefore, against a railway company can not be alimony.

It will be observed that by Art. 318, certain expenses incurred in attending the injured person prior to his death, his funeral expenses and injury resulting to his property, are made elements of damage. Another element is the damage which results to the surviving wife and children on account of the death. The first mentioned elements of damage could, perhaps, be recovered without the aid of statute, but the last could not be the foundation of an action without such aid. The damages, therefore, which the widow and children may recover under the law of Mexico, in addition to the elements first mentioned, is compensation for their pecuniary loss, viz.: The value of the support of which they have been deprived. Considering all these elements of damage in arriving at the amount to which the widow and children are entitled, it would seem that the laws of Mexico and Texas or the United States are not so unlike that our courts are without jurisdiction in the premises, but rather that the laws are similar, and the public policy of the two countries in that respect are the same.

As to the power and duty of the court to hear and determine a controversy or cause of action arising under the laws of another country, it being a transitory action and not against the policy of this country, there is no question. The court inquires, not wheth-

er the laws are similar or unlike, but whether the policy of this country forbids the enforcement of the right. It has been announced as the true rule, that "whether the domestic law provides for redress in like cases should in principle be immaterial, so long as the right is a reasonable one, and not opposed to the interests of the State." (Storey Con. of Laws, Sec. 625, Note a.)

Now consider the nature of the right of action in the case at bar. It is founded on a negligent act causing death, which is a tort in itself, the act of negligence being in itself wrongful, and not so merely by virtue of statutory enactment. Under the common law a remedy for the loss was given; but the damage was measured by the pecuniary loss, causing incidental damages suffered, such as expenses for medical attendance, care and nursing for the time intervening between the injuries and the death. (Cooley on Torts, p. 262.) The relief thus afforded was inadequate, until the passage of Lord Campbell's Act. The purpose and effect of this act was to remove the obstacle to recovery of damages for that "which is essentially and in its nature a tort."

Mr. Justice Brewer, in Stewart vs. B. & O. Ry. Co., 168 U. S., 445, rendering the opinion of the court, says: "It may well be that, where a purely statutory right is created, the special remedy provided by the statute for the enforcement of that right must be pursued; but, where the statute simply takes away the common law obstacle to a recovery for an admitted tort, it would seem not unreasonable to hold that an action for that tort can be maintained in any State in which that common law obstacle has been removed. At least it has been held by this court in repeated cases that an action for such a tort can be maintained 'where the statute of the State in which the cause of action arose is not, in substance, inconsistent with the statutes or public policy of the State in which the right of action is sought to be enforced." (Citing in his opinion Railroad Co. vs. Cox, 145 U. S., pp. 593, 605; Dennick vs. Railroad Co., 103 U. S., p. 11; Huntington vs. Attrill, 146 U. S., p. 657; Railroad Co. vs. Babcock, 154 U. S., p. 190.)

The law of Mexico, Articles 301, 304, 305, 311 and 318, Penal Code, it is respectfully submitted, removes the obstacle in the way of redress for the loss occasioned by the wrongful death of a person. The right of action exists in favor of the surviving wife and children both in Mexico and Texas.

(12) It appears from the testimony given on the trial (printed Record pp. 43 and 51) that Mr. Slater was injured one day in the Republic of Mexico, and was brought across to this country and died the following morning. Unquestionably, if he had survived, he could have maintained a suit for his injuries in the court in which this action was filed. Barrow Steamship Co. vs. Kane, 170 U. S., 105. Evey vs. Mexican Central Railway Co., 81 Fed. Rep., 294. While he was yet alive, which was several hours after his injury, he could have filed his suit, and the jurisdiction of the court could not have been questioned. The Revised Statutes of Texas, Article 3353*a*, provides that such suits shall not abate upon the death of the plaintiff, but shall survive to and in favor of his heirs and legal representatives. It would, therefore, appear, that if the suit had been filed by him before his death it afterwards could have been prosecuted by the present plaintiffs; whereas the jurisdiction was defeated because the heirs and legal representatives filed the suit direct, instead of prosecuting the action that might have been filed by the party receiving the injury which subsequently resulted in his death.

It is true the causes of action are not the same. In one, the suit is to recover damages occasioned to the injured person. Death intervening the action is prosecuted to judgment for damages to the injured person. In the other, the suit is for damages accruing to certain relatives on account of the negligent killing of deceased. But while the causes of action are different, the recovery is based, in each instance, on the same acts of negligence and the substantial relief afforded is the same in each. The diverse citizenship having brought the parties within the jurisdiction, and the defendant having appeared and answered, the power to adjudicate the case could not be defeated upon the contention of respondents.

Opposing counsel contended, and the Circuit Court of Appeals held, that the laws of Mexico did not provide for a recovery *in solido;* and upon this ground plaintiffs were denied any relief. The fact that the laws of Mexico give a right of action is not denied by counsel or by the court. How the damages are to be paid, or when, or by what means the payment shall be enforced, are questions solely pertaining to the remedy, matters which were never before known to defeat the jurisdiction of a court.

AUTHORITIES.

In the case at bar the Court recognizes a right without affording a remedy. Under the laws of Kentucky, real estate levied on and sold under execution may be redeemed by the owner. Will the courts of Texas refuse to enforce a contract made in that State because no such right of redemption is given by the laws of Texas?

If the Mexican law, under some circumstances, requires payment of damages to be made monthly, yet Article 220 (Printed Record p. 8) provides that security for such payments may be exacted in form of a mortgage, a bond, or a deposit of a sufficient amount; and it would seem that the court has the authority to require the entire amount awarded as support (damages) to be paid by the defendant *in solido.*

The difference in the laws of the two countries respecting the recovery of damages would seem, therefore, to be found in the manner of procedure, rather than in the substantial relief afforded. If in Mexico, the relief is in the nature of alimony, payable in installments, secured in advance by mortgage, bond or deposit, in Texas, that same relief is given, estimated at its present value and taking the form of a judgment for a specific sum. If under the facts of this case, applying the law of Mexico, it should appear that Slater's earnings (fifty dollars per month) were devoted to the

maintenance of his family and the education of his children, and that such amount would be the alimony which the wife and children should receive, then a deposit or security sufficient to produce six hundred dollars per annum could be exacted. Under the same facts, applying our laws, the present value of the same relief is ascertained from all the facts and circumstances, and judgment rendered for that amount.

As a limitation upon the monthly payment of damages, or support, the Mexican law provides that it shall cease when the females entitled thereto shall marry. The learned judge, speaking for the Circuit Court of Appeals, says that a jury might be able fairly and justly to assess in a lump sum the value of the right secured to the male beneficiaries; but says that in the case of females this could not be done because no human intelligence can tell when a woman is going to marry. It is true that difficulty lies along the path of such investigation, but do we meet any more uncertainties here, than when we attempt to arrive at the probable duration of the life of the beneficiaries; or, seek to calculate, by the aid of finite experience, the length of life the deceased would have enjoyed, the knowledge of which rests only with the Infinite? Marriage, as to the probable time of its consummation, is no more uncertain than death; and the jury, in the light of all the circumstances, aided by their general knowledge and experience, can fix the probable date of the one as well as they can arrive at the approximate time of the other.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the said case therein entitled the Mexican National Railroad Company, plaintiff in error, *versus* Lena M. Slater *et al.*, defendants in error, to the end that said case may be reviewed and determined by

this court as provided in section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3rd, 1891, or that your petitioners may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

Wm. A. Keller

Mason Williams

E. A. Atlee

attorneys for Petitioners

THE STATE OF TEXAS, }
COUNTY OF BEXAR. }

E. A. Atlee, being duly sworn, says that he is one of the attorneys and of counsel for Lena M. Slater, and her minor children, the Petitioners, above named, and as such has personal charge for them of the case in the foregoing petition mentioned, in the Circuit Court of the United States for the Western District of Texas, at Laredo, Texas, and in the United States Circuit Court of Appeals for the Fifth Circuit; That he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

(signed) E. A. Atlee

Sworn to and subscribed before me this 22nd day of November, 1902.

(signed) James F. Boyle
Notary Public Bexar County, Texas.

Notarial Seal

FILE COPY.

FILED
JAN 11 19
JAMES H. MCKENNEY

BRIEF FOR PETITIONERS

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 162.

LENA M. SLATER, W. F. SLATER, JESSE R. SLATER, ANNIE E. SLATER, AND HENRY G. SLATER, PETITIONERS,

vs.

THE MEXICAN NATIONAL RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 6, 1902.
CERTIORARI AND RETURN FILED JANUARY 19, 1903.

(18,741.)

15051

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 162.

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VS.

THE MEXICAN NATIONAL RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

STATEMENT OF THE NATURE AND RESULT OF THE SUIT.

This is an action to recover damages for injuries resulting in death, caused by negligence. The suit was instituted by Lena M. Slater, on the 17th day of November, 1900, in the Circuit Court of the United States, for the Western District of Texas, at Laredo. The plaintiff seeks to recover for herself, as surviving wife; and, as next friend, for William F., Jesse R., Annie E. and Henry G. Slater, minor children of herself and her deceased husband, William H. Slater. (Record, page 2.)

The death, out of which the alleged damages arose, resulted from injuries occasioned in the State of Tamaulipas, one of the States of the Republic of Mexico, alleged to have been caused by the negligence of the defendant, the Mexican National Railroad Co. A trial by jury on March 20th, 1901, resulted in a verdict in favor of plaintiffs for seven thousand dollars, apportioned as follows:

To Lena M. Slater	$2,691 00
To William F. Slater	453 00
To Jesse R. Slater	717 00
To Annie E. Slater	1,346 00
To Henry G. Slater	1,793 00

The plaintiffs are citizens of the State of Texas, residing in Webb county, Texas; and the defendant corporation, a citizen of the State of Colorado, having been created under the laws of that State. (Record, page 20.)

The question involved is: What construction will the courts of this country place upon the laws of Mexico relating to actions of the character stated?

PETITIONERS' BRIEF.

To maintain the judgment of the trial court, petitioners submit the following:

FIRST PROPOSITION.

Under the laws of Mexico, a clearly defined right of action exists for damages arising from injuries resulting in the death of a person, against the person whose negligence was the proximate cause of such injuries, there being no contributory negligence on the part of the person injured; such action lies in favor of the surviving wife and minor children of herself and her husband, whose death so resulted.

STATEMENT.

The petition was in usual form until it reaches the ninth paragraph, and then it proceeds as follows:

IX. Plaintiffs further allege that by the laws of Mexico which now exist and existed and were in force at the time and place of the happening of the killing of William H. Slater through the defendant's negligence, as aforesaid, they the plaintiffs, have had the right of action against the defendant for their damages, and they say that the following were, and are now, the laws of Mexico, applicable to this case, out of which the said right of action grew, and by virtue of which the same now exists in the said Republic of Mexico, to-wit:

From the Federal Constitution of the Mexican United States:

"Art. 72. Congress has power * * * (22) To enact laws governing the general lines of communication, and governing postoffices and mails."

"Art. 97. The Federal Courts has jurisdiction; (1) Of all questions growing out of the execution and application of the Federal Laws, except when the application of the law only affects interests of individuals, in which case the local Judges and Tribunals of the State shall entertain jurisdiction."

From the Penal Code of Mexico.

"Art. 4. A crime is a voluntary infraction of the penal law, doing that which it prohibits, or neglecting to do that which it commands.

"Art. 5. A misdemeanor is the infraction of police regulations or proclamations and good government.

"Art. 6. There are intentional crimes, and crimes resulting from neglect.

"Art. 11. Negligent crimes exist: (1) Where an act is done, or a duty omitted, which, although lawful in itself, is not so by reason of its consequences, if the accused fails to provide against the consequences, through negligence, want of reflection or care, by not making proper investigations, by not taking necessary precautions or through unskillfulness in any art or science, the knowledge of which is necessary in order that the act done may not result in injury. Unskillfulness is not punishable when he who does the act does not profess the art or science necessary to be known, and acts when impelled by the gravity and urgency of the case. * * * (3) Where the question relates to an act which is punishable solely by reason of the circumstances under which it is done, or by reason of a circumstance personal to the party aggrieved; if the accused is ignorant of such circumstance, through not having previously made the investigation which the duty of his profession or the importance of his case demands."

Pen. Code Bk. 2. "Civil Liability in Criminal Matters."

"Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses.

"Art. 304. Reparation comprehends: Payment of all damages caused to the injured party, his family or a third person for the violation of a right which is formal, existing and not simply

possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, a proximate and inevitable consequence.

"Art. 305. Indemnization imports: The payment of damages, that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an act of omission by which a formal, existing and not merely possible right is attacked, and for the value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done conformably with civil right.

"Art. 306. The condition required by the two preceding articles, that the damages and injuries should be actual, shall not prevent that the indemnization of subsequent damages and injuries be exacted by a new suit, when they shall have accrued; if they proceed directly from, and a necessary consequence of, the same act or omission from which resulted the previous damages or injuries.

"Art. 307. The payment of judicial expenses solely embraces those absolutely necessary, which the injured party incurs for the purpose of investigating the act or omission which causes the criminal proceeding and to avail himself of his rights in such proceeding or in the civil suit.

"Art. 308. The civil responsibility cannot be declared except at the instance of the party entitled to recover.

"Art. 309. The Judges who adjudicate upon the civil responsibility shall be controlled by the provisions of this title, in so far as its provisions extend; on other questions, they shall follow, according to the nature of the suit, the provisions of the civil or of the commercial laws which may be in effect at the time of the happening of the act or omission causing the civil responsibility.

"Art. 310. The right to civil responsibility forms a part of the estate of a decedent and descends to his heirs and successors, provided it be not the case of the following article, or that it arise from injury or defamation, and that, the offending person having been able in the life-time to bring his suit, he neither did so nor directed his heirs to sue; in such case the offense shall be understood as remitted.

"Art. 311. The action to enforce civil responsibility demanding support of a person guilty of homicide is personal, and belong exclusively to the persons named at the end of article 318 as directly damaged. Consequently such action forms no part of the estate of the deceased, nor is it extinguished, although the latter pardon the offense in life.

"Art. 318. The civil responsibility that grows out of a homi-

cide done without right (or justification) comprehends the payment of the indispensible expenses of the burial of the body, the expenses and necessary charges made for the cure of the deceased, the damages that the homicide causes to the property of the deceased, and of the support not only of the widow, descendants and ascendants of the deceased, who were being supported by him, he being under legal obligations to do so, but also to the posthumous descendants that he may leave.

"Art. 319. The obligation to furnish support shall last during all the time that the deceased might have lived if the homicide had not killed him, and that time shall be calculated by the Judges according to the table at the end of this chapter, but taking into consideration the state of the health of the deceased before the homicide was committed. As limitation of this rule the obligation shall cease: 1. At whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it. 2. When those beneficiaries get married. 3. When the minor children become of age. 4. In any other case in which, according to law, the deceased, if alive, would not be required to continue the support.

"Art. 320. In order to fix the amount which should be given as the measure of support, the ability of the party responsible for the killing shall be taken into consideration and the necessities and circumstances of the persons entitled to receive it."

"Art. 325. * * * Table of mortality and expectancy of life:

A 10	Corresponded	40.80
" 15	"	37.40
" 20	"	34.26
" 25	"	31.34
" 30	"	28.52
" 35	"	25.72
" 40	"	22.89
" 45	"	20.05
" 50	"	17.23
" 55	"	14.51
" 60	"	11.05
" 65	"	09.63
" 70	"	07.58
" 75	"	05.87
" 80	"	04.60
" 85	"	02.00

Federal Civil Code, Chap. IV.

"Art. 205. The obligation to give support is reciprocal; he that gives support has at the same time the right to ask it.

"Art. 206. Married people in addition to the general obligation imposed by matrimony, have that of giving support in cases of divorce and others designated by law.

"Art. 207. Fathers are obliged to support their children. If it should be impossible for parents to do so, or should they be unable to do so, the obligation falls upon other ascendants by both lines of ascendancy who are nearest of kin.

"Art. 208. The children are obliged to give support to their parents. If it is impossible for the children to do so, or they are unable to do so, then those descendants next in kin are obliged to do so.

"Art. 211. The support comprehends eating, dress, habitation and assistance in case of sickness.

"Art. 212. In regard to minors support it comprehends in addition to the necessary expenses for the primary education of the party entitled to support, and to furnish him some calling, art or profession, honest and adequate to his sex and personal circumstances."

"Art. 214. The support should be proportioned according to the abilities of those who have to give it, and the necessities of those who have to receive it."

"Art. 220. The assurance of the support may consist in a mortgage, bond or deposit of sufficient amount to cover the support."

"Art. 225. The right to receive cannot be renounced nor is it an object of transfer or assignment."

Pen. Code, Bk. 2.

"Art. 313. The Judges who take cognizance of suit based upon civil responsibility shall endeavor that the amount and terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following articles shall be observed: * * *

"Art. 321. In case of blows or wounds, from which the injured party does not remain crippled, lamed or deformed, he shall have the right that the responsible party pay all his expenses of cure, the damage he may have suffered, and that which he may fail to gain during the time which, in the opinion of competent persons, he may not be able to do the work by which he subsists. But it is essential that the inability to work should be the direct result of the wounds or blows, or be a cause which is the immediate effect of such blows or wounds.

"Art. 322. If the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which [he] shall recover, and can properly devote himself to other and different work, which may be lucrative and appropriate to

his education, habits, social position and physical constitution, the civil responsibility shall be reduced to paying him the sum which his liability to earn in his new employment falls short of his daily earnings in his former occupation.

"Art. 323. If the blows or wounds cause the loss of any member, not indispensible for work, or the person wounded or struck remain otherwise crippled, lame or deformed, by that circumstance he shall have the right not only to the damages and injuries, but also to the sum which the Judge may determine as extraordinary indemnity, considering the social position and sex of the person and part of the body remaining crippled, lamed or deformed.

"Art. 324. The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability.

"Art. 325. The provisions of the foregoing articles for computing the civil responsibility for wounds or blows shall be applied to all other cases where, in the violation of a penal law, a person may cause the illness of another, or may have placed him under a disability to work.

"Art. 326. No person shall be charged upon a civil liability upon an act or omission contrary to a penal law unless it be proven; that the party sought to be charged usurped the property of another; that without right he caused, by himself or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority.

"Art. 327. Whenever any of the conditions of the preceding articles are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability."

"Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 326 and 327, it is an indispensable condition that the act or omissions of the clerks or servants causing the liability shall occur in the service for which they were employed.

"Art. 331. Under the conditions of the preceding article, those liable are * * * railroad companies."

"Art. 363. Limitations: The various actions by which civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked shall be extinguished according to the terms and in the manner provided by the civil code of the com-

mercial code, according to the nature of the demand and the subject-matter treated of.

"Art. 364. Amnesty shall not extinguish the civil responsibility, nor the actions to exact it, nor the legal rights which third persons may have acquired. Nevertheless, when the responsibility may not yet have been made effective, and the demand is not for restitution, but for reparation of damages, for indemnity for injuries, or for the payment of judicial expenses, the guilty person shall remain free from such obligations only when it is so declared in the amnesty and they are expressly left to the charge of the public treasury.

"Art. 365. A pardon shall in no case extinguish civil responsibility nor the action to enforce it, nor the legal rights which third persons may have acquired.

"Art. 366. Limitation is interrupted by criminal proceeding until final judgment is pronounced. This done the term of limitation commences to run anew."

Transitory Law: Pen. Code.

"Art. 26. Until it is determined in the new code of procedure what judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following rules shall be observed: * * * (5) Actions to enforce the civil liability may be brought before the court of civil jurisdiction, whether or not the criminal proceeding has been commenced; but while the latter is pending the proceeding in the former shall be stayed."

From the Federal Civil Code.

"Art. 9. Against the observance of the law, disuse, custom or practice to the contrary cannot be alleged."

"Art. 20. When a judicial controversy can be decided neither by the text nor the natural meaning or spirit of the law, it must be decided according to the general principles of right, taking into consideration all the circumstances of the case.

"Art. 21. In cases of conflict of rights and the absence of express law for the special case, the controversy shall be decided in favor of him who seeks to avoid damages, and not in favor of him who seeks to obtain profit. If the conflict should be between equal rights, or rights of the same specie, it shall be decided by observing the greatest equality possible between the parties."

"Art. 1095. Limitation bars in three years * * * (8) Civil responsibility for injuries, whether done by word or by writing, and that which arises from damage caused by persons or animals,

and which the law imposes upon the representatives of such persons or the owners of the animals."

Act of Congress of December 15, 1881.

"Art. 1. The executive shall regulate the service of railroads, telegraphs and telephones constructed, or which may in the future be constructed, upon Mexican territory, according to the following basis: (1) Railroads, telegraphs and telephones which in the Federal District and territory of Lower California unite together two or more municipalities, or Federal District and territory of Lower California with one or more States; those which communicate two or more States with each other; those which touch any point in the territorial boundary line of the republic and foreign countries, or run parallel therewith within a region of twenty leagues, are known as general lines of communication within the meaning of fraction 22 of article 72 of the constitution. (2) These general lines of communication and their branches shall be subject exclusively to the federal legislature, executive and judicial powers, in their respective spheres, in all cases where any of the following matters are involved: * * * (g) Construction and repair of the works. Crimes committed against the security or integrity of the works or against the operation of the lines. (h) Security of the same works for which the companies, through delays or obstructions, carelessness or fault in the service or for accidents or mishaps in the operation."

From the Regulations for the Construction, Maintenance and Operation of Railroads.

"Art. 52. The coaches and cars which enter into the makeup of a train shall have draw-heads of the same height, so that their centers will be opposite to each other.

"Art. 53. No car of whatever kind shall form a part of the make-up of a train, unless the same shall have been previously inspected very carefully."

"Art. 99. The company shall be responsible for the moving of all trains on its road."

"Art. 184. Companies (railroad) are liable for all faults and accidents which occur through tardiness, negligence, imprudence or want of capacity of their employes."

"Art. 208. All violations of this law which companies (railroad) commit shall be subject to punishment by the administration of a fine up to five hundred dollars, which the department of public works shall assess, reserving always the right of individ-

uals through indemnity and the liabilities which the companies may incur through criminal acts or omissions committed by them."

Plaintiffs further allege that by reason of the general statutes of the State of Texas and by virtue of general principles of right and justice and of the laws of Mexico hereinbefore mentioned, they had and now have a right of action for their damages against (the defendant) in the Republic of Mexico, and the same now exists the defendant in the Republic of Mexico, and the same now exists in said country as well as in the State of Texas, and in the United States of America. And they say that the acts of negligence upon the part of the defendant, its agent, servant and employes were wrongful and actionable as has been hereinbefore shown by the plaintiff in the Republic of Mexico at the time of the killing complained of, and are now so, and they say that the same were then and are now wrongful and actionable in the United States of America, and in the State of Texas. And plaintiffs say that by reason of the negligent killing of the said William H. Slater, they have suffered damages in the sum of thirty thousand dollars ($30,000.00).

Wherefore, premises considered, plaintiffs pray that defendant be cited to answer this petition and that they have judgment for their said damages and that said damages be apportioned among the plaintiffs as they may be found to share therein, and that they have judgment for all costs of suit and for general and special relief. (Record, pages 4-11.)

The defendant demurred on the following ground:

Now comes defendant and says that the allegations in plaintiff's petition are wholly insufficient to require further answer of this defendant, and of this it prays judgment of the Court.

1st. And specially excepting defendant says that it affirmatively appears from the petition of the plaintiff that the wrong charged to have resulted in the death of Wm. H. Slater occurred in the Republic of Mexico and not within the jurisdiction of this Court.

2nd. That it affirmatively appears from the allegations of said petition that the laws of Mexico, where the wrong is alleged to have occurred, are not similar or analogous to the laws of Texas, but that the same are dissimilar and different to the laws of Texas, in this, that under the laws of Mexico, plead by plaintiffs in said petition, the parties entitled to institute and maintain suits for wrongs resulting in death, are not the same as in Texas; and in this, that they are dissimilar in many other respects made

obvious by an explanation of the laws of Mexico plead by plaintiffs; and in this, that under the laws of Texas, it is provided that in order to authorize a recovery for the death of another that the wrongful act, negligence, carelessness, unskillfulness or default causing the death of another must be of such a character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury, whereas there appears no such limitation upon the survivor under the laws of Mexico; upon the contrary, it appears that a cause of action in favor of certain named persons would exist, notwithstanding the injured person during life has extinguished said cause of action; and in this. that under the laws of Texas, in like cases, the recovery would be "in solidum," while under the Mexican laws plead such a recovery is not intended or contemplated, but must be in install ments not to exceed the amounts contributed by the deceased during life in support of the beneficiaries or persons entitled to be supported by the deceased.

3rd. And especially further, plaintiff's petition affirmatively shows that plaintiff's right to recover damages in Mexico, if any, depends wholly upon an infraction of a penal statute of the Republic of Mexico; that to authorize a recovery under the laws of Mexico this Court must find the act or omission charged to be a violation of the penal code of Mexico, portions of which are set up in plaintiff's petition; that said laws have no extra-territorial effect, and this Court has no jurisdiction to determine such matters, or to adjudge damages based upon a penal statute of a foreign government.

4th. And for further exception, it does not appear that said cause of action is by all parties authorized under Mexican law to maintain an action for recovery of damages, nor does it appear for the use of all persons, that might be entitled to recover damages for the wrongful killing of another, but is for the sole use of the wife and children not negativing the existence of others entitled to recover under the Mexican law, and is therefore not authorized by the Texas statute, but is in direct violation thereof, and if entertained would subject defendant to a multiplicity of suits, contrary to the well established policy of Texas.

5th. And for further exception defendant says, the laws of Mexico, as plead, are so unlike and dissimilar to the laws of Texas that this Court should not undertake to administer the same under the doctrine of national or interstate comity.

Of all of which defendant prays judgment of the Court. (Record, pages 12-13.)

These demurrers were overruled (Record, page 13), and, by

amendment, the defendant, on March 18th, 1901, excepted further, and pleaded as follows:

Now comes the defendant Mexican National Railroad Company, by its counsel, and after leave of Court first had amends its original answer filed herein on December 4th, 1900, and for and in lieu of said answer makes and filed this its first amended original answer, as follows:

1st. In addition to the general and special exceptions heretofore urged to plaintiff's petition, defendant excepts to said petition, because it affirmatively appears from said petition that the said....., who sues, has a husband upon whom she is dependent for a support, and that therefore she is not entitled to recover in this suit, of which defendant prays judgment of the Court.

2nd. Defendant excepting further says that it affirmatively appears from plaintiff's petition that the right of survivors to recover damages for personal injuries resulting in death is alimony or pension, payable in installments, and is, therefore, so dissimilar from the laws of Texas and of the common law that this Court can not administer or enforce said laws and rights.

And of this defendant prays judgment of the Court.

Comes defendant again, not waiving its plea to the jurisdiction, but specially urging the same, as well as its general and special exceptions, and in the event that this Court shall overrule its said plea and exceptions, denies all and singular the allegations in said petition contained and demands strict proof thereof, and of this defendant puts itself upon the country.

And for further plea in this behalf, defendant shows that this Court should not undertake to exercise its jurisdiction, if any in fact exists, which defendant denies, to adjudicate upon the laws of Mexico, set up as a basis of the damages sought to be recovered, because the laws are unlike and dissimilar to the laws of Texas, in this, that the right secured under the laws of Mexico to certain representatives of deceased persons to recover damages, to-wit: of surviving husbands, wives, mothers, fathers and children is the right of alimony or pensions, to be paid monthly and by installments, which right ceases whenever the necessity for alimony or support no longer exists, such as a change of fortune, marriage of the surviving wife and daughters and when the boys arrive at the age of 21 years, which right and cause of action secured under the laws of Mexico is contrary to the public policy of Texas, as the laws of Texas have provided no remedy for the enforcement of such a right, and, therefore, our Courts, neither in law or in equity, have the power and authority to create a rem-

edy for the enforcement of such a right, and of this defendant prays judgment of the Court and puts itself upon the country.

And again comes defendant and shows that the laws of Mexico as pleaded, when construed in connection with other provisions of the Mexican laws securing a right of recovery in surviving wives, mothers, fathers, husbands and children, for personal injuries resulting in death, to-wit: Arts. 211, 212, 213, 214, 217, 221 and 224 of the Civil Code of the Federal District, and of Arts. 1376 and 1377 of the Code of Civil Procedure, the laws of Mexico that govern, secures a right of alimony, or in the nature of a pension, and therefore secures a right of recovery unknown to the laws of Texas and for the enforcement of which no law of Texas or of the United States has been provided, and therefore this Court has no jurisdiction to grant the relief prayed, and of this defendant prays judgment and puts itself upon the country.

And for further answer in this behalf, defendant shows that plaintiff ought not to have and maintain their action because at the time of the accident in which William H. Slater was injured and for a long time anterior thereto, he, the said William H. Slater, was in the employ of defendant company as a brakeman, and that the injury he suffered was the direct and proximate result of his, the said William H. Slater's own negligence and carelessness in the performance of his duty as such brakeman, and of this defendant puts itself upon the country. (Record, pages 14-15.)

In replication to the amended answer, plaintiffs filed their supplemental petition as follows:

Now comes plaintiffs by leave of Court and files this their first supplemental petition in replication to the first amended original answer of defendant, filed on March 18th, 1901, and demurs to the matters and things therein pleaded because the same constitute no defense to the cause of action.

And especially because the laws referred to relating to alimony and person, viz.: articles of the Civil Code mentioned, are provisions of the laws of Mexico regulating matters growing out of the marriage relation, involving the duties and obligations of parties to the marriage contract and of parents and children; and such provisions do not show a material or substantive difference, or any difference between the laws of Texas, of the United States and Mexico, as to the nature of the right of action claimed by plaintiffs to exist under the laws of Mexico; nor do such provisions show or tend to show that the laws of Mexico on the sub-

ject of damages for injuries resulting in death are contrary to the public policy of Texas or of the United States.

And further excepting specially, because the provisions of the laws referred to, viz.: Arts. 1376 and 1377, Code of Procedure, relate to a proceeding for the purpose of obtaining a decree for temporary alimony and in no sense can they be the foundation for a defense to the action.

And of this defendant (plaintiff) prays judgment of the Court. (Record, pages 15-16.)

In aid of the exceptions contained in the supplemental petition, plaintiffs filed as exhibits "A" and "B," the following:

EXHIBIT "A."

Chapter IV, of Book I, Title V—Concerning Alimony.

Art. 205. The obligation to furnish alimony is reciprocal, the one who furnishes alimony has in his turn the right to demand it.

Art. 206. Parties to the marriage contract, in addition to the general obligation which the marriages imposes, are bound for alimony in cases of divorce and in other cases provided by law.

Art. 207. Parents are bound to give alimony to their children. If there be no parents or they be not able to give alimony, the obligation falls on the other relations on both sides in the nearest ascending grade.

Art. 208. Children are bound to give alimony to their parents. If there be no children, or if they are not able to give alimony, the nearest relations in the descending grade are bound.

Art. 209. If there be no relations in the ascending or descending grade, or if they are not able to give alimony, the obligation falls on the brothers and sisters of both parents; on those of the mother alone, if there be none of the father, and on those of the father if there be none of the mother.

Art. 210. Brothers and sisters are bound to give alimony to their younger brothers and sisters only until they are 18 years of age.

Art. 211. Alimony comprehends food, clothing, dwelling place and attendance in sickness.

Art. 212. Respecting minors, alimony includes in addition, the expenses necessary for the primary education of the dependent, and to prepare him for some occupation, art or profession, honest and suitable to his sex and personal circumstances.

Art. 215. The one bound to supply alimony fulfills his obliga-

tion by assigning a pension sufficient to support the dependent, or by taking him into his family.

Art. 214. Alimony should be in proportion to the estate of the one bound, and to the necessities of the one who receives it.

Art. 215. If the obligations to receive alimony falls upon several, and all are able to give, the judge shall apportion the amount among them according to their means.

Art. 216. If only some of these are able, the amount of alimony shall be apportioned among them, and if one only shall have the means he alone shall comply with the obligation.

Art. 217. The obligation of supplying alimony does not include that of endowing the children, nor that of providing them with capital to prosecute the business, are [art] or profession for which they may have been fitted.

Art. 218. The right to demand that alimony be made secure exists in favor of : I. The person entitled to alimony. II. The relative in ascending grade who may have him (the person entitled thereto) under his parental control. III. The guardian. IV. The brothers and sisters. V. The public department.

Art. 219. If the person who demands security of alimony in the name of the minor, cannot and does not wish to represent him in Court, the Judge shall appoint a temporary guardian.

Art. 22 [220]. The security may consist of a mortgage, bond or deposit of an amount sufficient to cover the alimony.

Art. 221. The temporary guardian shall give security for the annual value of the alimony. If he should control any fund designated for that purpose he must give legal security for it.

Art. 222. Where the father enjoys the use of the property of the child, the value of the alimony shall be deducted from it (the income) if it is sufficient to cover it (the alimony). On the contrary, where the income is not sufficient the difference shall be (a charge) on account of the father.

Art. 223. If the necessity of the dependent proceeds from bad conduct the Judge, having knowledge of the cause, may diminish the sum fixed as alimony, placing the one at fault, if necessary, under care of competent authority.

Art. 224. The obligation to supply alimony ceases: I. When the one bound lacks the means of compliance. II. When the dependent is no longer in need of alimony.

Art. 225. The right to receive alimony cannot be renounced, nor can it be subject to compromise between the parties.

EXHIBIT "B."

Chapter 11, of Book 111, Title 1.

Civil Procedure. *Temporary Alimony.*

Art. 1372. In order to decree temporary alimony to one who has the right to exact it, it is necessary:

I. To make complete proof of the right under which it is asked.

II. To prove proximately at least, the means of the one who should give alimony.

III. To make sufficient proof of the urgent necessity for temporary alimony.

Art. 1373. The proof required under paragraph 1 of the preceding article shall be the last will, the contract or executory instrument which contains the obligation to give alimony; the contract will have to be in from of a public writing.

Art. 1374. When alimony is asked on the ground of consanguinity, the documents should be presented which prove the interested party to be within the cases provided in article 207 to 210 and 3324 and articles of the civil code relating thereto.

Art. 1375. When husband or wife asks alimony, the act or certificate of marriage must be presented.

Art. 1376. After compliance with the provisions of the preceding articles, the Judge, if he believes the right has been established, shall designate the amount of alimony and shall adjudge it, directing it to be secured months in advance in all cases.

Art. 1377. Immediately on adjudging temporary alimony, the first monthly payment shall be exacted of the one liable for it. (Record, pages 16-19.)

It was agreed that the translations of the laws of Mexico, pleaded by plaintiffs and defendant were correct, and are the laws of Mexico having application to this case. (Record, page 19.)

The demurrers of defendant were overruled; those of the plaintiffs were sustained; and the case went to the jury under the evidence and the charge of the court, resulting as before stated. (Record, page 20.)

Remarks.

We believe the law is correctly stated by the learned Judge

of the U. S. Circuit Court of Appeals, rendering the opinion in this case, wherein it is held that a cause of action is given under the laws of Mexico here under consideration; for, thus it is stated in the opinion of the court: "The statutes of Mexico creating the "plaintiffs' right, place the acts and omissions, charged against the "defendant to support their claim of right, in the class of negli- "gent crimes; but it cannot be contended that the act belongs to "that class of criminal laws which can only be enforced by the "courts of the country where the offense was committed, for it "gives a civil action to recover damages for a civil injury." (Record, page 89.)

SECOND PROPOSITION.

The civil action for damages for injuries resulting in death, under the laws of Mexico, is a personal action, transitory in its nature; and the right created by those laws not being contrary to the public policy of the State of Texas, nor calculated to injure the State of Texas, or the United States, or their citizens, the same may be enforced at law in the Federal courts within the State of Texas—and in this suit, where, by personal process and an appearance, the wrongdoer has been subjected to the jurisdiction of the court.

STATEMENT.

The citizenship of the parties is diverse. (Record, page 2.) The defendant corporation appeared and filed its pleas. (Record pages 12 and 14.)

AUTHORITIES.

Dennick vs. Railway Co., 103 U. S., 11.
Railway Company vs. Cox, 145 U. S., 593.
Railway Company vs. Babcock, 154 U. S., 190.
Huntington vs. Attrill, 146 U. S., 670.
Stewart vs. B. & O. Ry. Co., 168 U. S., 445.
B. & O. Ry. Co. vs. Joy, 173 U. S., 226.
Evey vs. Mexican Central Ry. Co., 81 F. R., 294.
Mexican Central Ry. Co. vs. Marshall, 91 F. R., 933.
Story on Conflict of Laws, Sec. 625, note "a."

Cooley on Torts (as to damages recoverable), page 270 *et seq.*

Texas Revised Statutes, Tit. 57, Arts. 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027.

Ry. Co. vs. Haist, 72 S. W. Rep. (Ark. Sup. Ct.), 893, and authorities there cited.

REMARKS.

As to the power and duty of the court to hear and determine a controversy or cause of action arising under the laws of another country, it being a transitory action and not against the policy of this country, there is no question.

The court inquires, not whether the laws are similar or unlike, but whether the policy of this country forbids the enforcement of the right. It has been announced as the true rule, that "whether the domestic law provides for redress in like cases "should in principle be immaterial, so long as the right is a rea- "sonable one, and not opposed to the interests of the State." (Story Con. Laws, Sec. 625, note "a.")

Under the decisions of our courts, an action for damages for injuries resulting in death is not purely a statutory action. It is founded on the negligent act causing death, which is a tort in itself, the act of negligence being in itself wrongful, and not so by virtue of statutory enactment. Under the common law a remedy for the loss was given; but the damage was measured by the pecuniary loss causing incidental damages suffered, such as expenses for medical attendance, care and nursing for the time intervening between the injury and the death. (Cooley on Torts, page 262.) The relief thus afforded was inadequate, until the passage of Lord Campbell's Act, the purpose and effect of which was to remove the obstacle to recovery of damages for that "which "is essentially and in its nature a tort."

In Stuart vs. B. & O. Ry. Co., 168 U. S., 445, it is said: "Where the statute simply stakes away the common law obstacle "to a recovery for an admitted tort, it would seem not unreasona- "ble to hold that an action for that tort can be maintained in "any State in which that common law obstacle has been removed. "At least it has been held by this court in repeated cases that an

"action for such a tort can be maintained where the statute of "the State in which the cause of action arose is not, in substance, "inconsistent with the statutes or public policy of the State in "which the right of action is sought to be enforced." (Citing Ry. Co. vs. Cox, 145 U. S., 593, 605; Dennick vs. Ry. Co., 103 U. S., 11; Huntington vs. Attrill, 146 U. S., 657; Ry. Co. vs. Babcock, 154 U. S., 190.)

Arts. 11, 301, 304, 305, 311 and 318, of the Penal Code of Mexico remove the obstacle in the way of redress for the loss occasioned by the death of a person caused by the negligence of another, and enable the surviving wife and children to recover damages for such loss. By Article 318 (Record, page 6), expenses incurred in attending the injured person prior to his death, funeral expenses, injury to his property and the support for the wife and children, of which they have been deprived, are all made elements of damage; and Article 304 (Record, page 5) contemplates the payment of all damages caused to the family of the injured party, if such damages are actual and arise directly and immediately from the act or omission complained of. It would seem, therefore, that the laws of Mexico, in specifying certain elements of damage, are not contrary to the policy of the State or the United States, and that, under the laws of each country, the measure of damage is a just and reasonable compensation for pecuniary loss.

THIRD PROPOSITION.

Damages for injuries resulting in death, the payment of which may be exacted from a railroad company under the laws of Mexico, is not alimony in the statutory meaning of that term; but, the support of which the wife and children have been deprived may be considered with other facts in determining the amount of the damages occasioned, and payment of such damages may be enforced in the courts of law of this country without reference to the procedure under the code of Mexico to enforce the payment of alimony.

REMARKS.

In the Civil Code of Mexico, Title V treats of subjects growing

out of the marriage relation; and Chapter IV, of such title, treats of *Alimony,* or in other words, declares the reciprocal obligations of husband and wife, of parent and child, to furnish alimony; while Chapter I, of Book III, Title I, Civil Procedure of Mexico, prescribes the manner of enforcing that obligation. (Record, page 16-19.)

Alimony may mean support—but the term support does not always mean alimony. The latter, as defined by Bouvier (as well as by the laws of Mexico, in substance), is the allowance which a husband by order of court pays to his wife, living separate from him, for her maintenance—the former, in common parlance, is a maintenance with provisions and the necessary means of living.

Article 205, of Chapter IV (Record, page 16), makes the obligation to furnish alimony reciprocal; and if such is the nature of the obligation cast upon a railroad company through its fault or negligence, then, under such provision of law, there must be reciprocity as to the obligation, between the railroad company and those entitled to alimony.

If other persons are also liable for alimony and are able to respond, then, under Articles 215 and 216, of Chapter IV (Record, page 17), the amount of alimony to be furnished must be apportioned among those liable, according to their means. These features of the law argue the unreasonableness of the contention that such damages, for which a railroad company is liable, is alimony in the statutory meaning of that term, and that the only mode of recovery of such damages, available to the surviving wife and children is the procedure provided for the recovery of alimony.

If it be shown, however, that damages for injuries resulting in death are to be collected as alimony or pension under the law of Mexico, it does not follow that our courts must adopt the same method of enforcing the right; and our courts should not refuse relief on the ground merely that the procedure for collecting such damages under our laws, may not be the same as that provided by the laws of Mexico; nor does it follow that substantial relief may not be afforded in our courts.

Considering, however, in argument, that damages under the

law of Mexico is alimony or pension, why may not a judgment *in solido* be rendered in our courts for the present value or equivalent of the amount of alimony recoverable under the law of Mexico? For, it is provided in Article 220 of the Chapter on Alimony (Record, p. 18) that a deposit may be exacted sufficient to cover the amount payable as alimony. The amount to be thus secured must first be ascertained. This can only be determined by a consideration of the facts and circumstances of the case. If in this case it should appear that the earnings of deceased (fifty dollars per month) were devoted to the support and maintenance of his family and the education of his children, and that such amount would be the alimony which the wife and children should receive, then a deposit or security sufficient to insure six hundred dollars per annum could be exacted under the law of Mexico. Under the same facts, applying our laws and the procedure of our courts, the present value of such allowance may be ascertained from all the facts and circumstances; and a judgment rendered for that value, *in solido*, would be substantially the same relief as that afforded by the law of Mexico—such is the judgment complained of in this case, and the difference in the laws of the two countries would, therefore, seem to lie in the manner of procedure, rather than in the substantial relief afforded.

The learned judge of the Honorable Circuit Court of Appeals who delivered the opinion in this case, in commenting upon the laws of Mexico, says: "We have seen that the foreign law "here involved does not belong to the class of criminal laws "which can only be enforced by the courts of the foreign country. "The right created by those laws is not contrary to the public "policy in the State of Texas, in which State the Circuit Court "to which this writ of error issued is held. Texas Rev. Stats. "(1895), Arts. 3017, 3027. It is not contrary to abstract jus- "tice or to pure morals, nor calculated to injure the State of "Texas or the United States or their citizens. We have already "shown that the Circuit Court has jurisdiction of all of the par- "ties to this action." (Rec. p. 90.) And it may be well said that the Circuit Court has jurisdiction of the subject matter also.

The wife and children are asking for damages—not for alimony. Art. 184 (Record, page 11) of the regulations relating

to railroads, make railroad companies liable for all faults and accidents which occur through the negligence of their employes; Art. 11 (Record, page 5) of the Penal Code, defines the act of negligence out of which the liability for damages will arise; Art. 301 (Record, page 5), of the Penal Code, prescribes the nature of that liability, viz.: making it an obligation (1) for restitution, (2) for reparation, (3) for indemnization and (4) for payment of judicial expenses; Art. 304, and Art. 305 (Record, page 5), of the Penal Code, define reparation and indemnization—the former term being made to include *payment of all damages to the family of the person injured.* Now, will the Court say that the family (the wife and children) may not maintain such action for damages? Can it be justly said that the only remedy is an action for alimony as defined by Chapter IV, of the Civil Code? The substantial relief contemplated by the provisions of the Penal Code mentioned, may be given in our Courts of law. Plaintiffs are citizens of the United States, having a right of action under the law of Mexico; their cause of action is transitory; they seek its enforcement in the forum where the wrongdoer has entered his plea; and the policy of our law has always been *to find and apply a remedy wherever the right of action may be shown.*

FOURTH PROPOSITION.

Contingencies having arisen, under which, according to the law of Mexico, the liability for damages for injuries resulting in death will cease, may be pleaded in abatement, or as matter of defense, the effect of which would be to bar the remedy, rather than to extinguish the right; but, not having arisen, the court would not be called upon to construe the law relating thereto; and while the action might abate, under the procedure of the foreign country, it would not necessarily abate under the procedure of our country.

STATEMENT.

(Arts. 319 and 320, Penal Code of Mexico.) (Record, page 6.)

AUTHORITIES.

B. & O. Ry. Co. vs. Jay, 173 U. S., 226.

REMARKS.

In the case of B. & O. Ry. Co., 173 U. S., 226, the following question was referred to the Supreme Court of the United States: "Does an action pending in the Circuit Court of the United States "sitting in Ohio, brought by the injured person as plaintiff to "recover damages for injuries sustained by the negligence of "the defendant in Indiana, finally abate upon the death of the "plaintiff, in view of the fact that, had no suit been brought at "all the cause of action would have abated in that State?" The answer to this question sustains the contention here made.

The court, in giving a negative answer to the question, say: "It is scarcely necessary to say that the determination of the "question of the right to revive this action in the name of Her- "vey's personal representative is not affected in any degree by "the fact that the deceased received his injuries in the State of "Indiana. The action for such injuries was transitory in its "nature and the jurisdiction of the Ohio court to take cognizance "of it upon personal service or on appearance of the defendant "to the action cannot be doubted. Still less can it be doubted "that the question of the revivor of actions brought in the courts of Ohio for personal injuries is governed by the laws of that "State, rather than by the law of the State in which the injuries "occurred."

In the case cited the contingency of plaintiff's death had actually arisen, and it was sought to apply the law of Indiana—while in the case at bar, none of the contingencies prescribed in the law of Mexico had arisen; and it was not contended that there was not a perfect, subsisting right of action under the law of Mexico; but had any such contingencies arisen after institution of suit, the case cited would indicate the course to be taken, viz.: that the cause proceed to judgment according to the law of the forum.

The Circuit Court of Appeals in this case, however, encountered what appeared to them the barrier to relief, in the limitation relating to the female beneficiaries; and were constrained to hold

that such limitation affects the plaintiffs' right, and contemplates not merely defensive matter available after marriage of such beneficiaries; and that while a jury might be able fairly and justly to assess in a lump sum the value of the right secured to the male beneficiaries, yet this could not be done in the case of females, because no human intelligence can tell when a woman is going to marry.

It may be a difficult question—so it is, also, to determine how long a man or woman will live. Mortality tables do not answer it. Present conditions of health, habits of living, and other circumstances may be considered in order to reach a conclusion. The conclusion reached, however, cannot be said to be certain—unless it may be regarded as fixed in cases where sentence of death is passed, and even then, sometimes the victim outlives the period of life allotted. Marriage, as to the probable time of its consummation, is no more uncertain than the time when death will occur—the jury, in the light of all the circumstances, aided by their general knowledge and experience, can fix the probable date of the one, as well as they can arrive at the approximate time of the other.

The case of Railway vs. Kuehn, 70 Texas, 382, which is cited in the opinion to support the proposition: "That pending the suit the widow married again does not preclude her right of "action," is not against the contention here made. For in that case Walker, judge, rendering the opinion, says: "The fact" (her marriage) "doubtless affected the verdict, as it gave her less "damages than were given to each of the children." If the actual fact of marriage may be properly considered in fixing the amount of damages, then, also, may the probability or possibility of future marriage, whether remote or otherwise, be so considered.

FIFTH PROPOSITION.

The exclusion of the testimony of Emelio Velasco, if error, was not prejudicial—the testimony was merely cumulative; and wherein it was a mere opinion and did not show how the courts of Mexico had, at any time, construed the laws of that country applicable to the issues raised in this suit, it was inadmissible.

REMARKS.

Notwithstanding the exclusion of the testimony of the witness, the Honorable Circuit Court of Appeals gave it all consideration, as if it were all the evidence available. It might be shown by other distinguished lawyers of Mexico that in some of the States of Mexico, alimony, of which Mr. Velasco speaks, is recoverable either at stated periods, or in one fixed amount. Had the trial court admitted the testimony of Mr. Velasco the adverse party would have been accorded the right to offer testimony in rebuttal. If the foreign law must be established by evidence like any other fact, the right of parties to adduce evidence of the fact to be established should not be cut off by closing the door against them.

The evidence of Mr. Velasco, however, in so far as it is merely cumulative, worked no prejudice to either party to the trial; but wherein it is the mere expression of opinion, not as to what the law is, but as to what construction should be placed upon it, rather than as to how the courts have construed it, is not admissible, and the trial court did not err in its exclusion.

SIXTH PROPOSITION.

As a defense to the action the defendant pleaded that damages prayed for in the case, recoverable under the law of Mexico, was in the nature of alimony or pension, and could be recovered only under the procedure of that country for the recovery of alimony; and that such remedy could not be applied by our courts because of the difference between the laws of the two countries relating to the manner of granting the relief; the proof fails to establish such defense, and the judgment of the trial court should be affirmed

REMARKS.

The statute laws were pleaded and it was agreed that they embraced the law applicable to the case. From plaintiffs' view of the law it was necessary to show that there was a legal obligation resting upon the deceased to support his wife and children. That obligation seemed to be expressed in Chapter IV, of the Civil Code, and for that reason certain articles thereof

were set out in the petition. It was not considered, however, that the right of action for alimony was the only relief obtainable in the courts of Mexico, in view of the fact that, under the provisions of the Penal Code of Mexico, the liability of the wrongdoer was therein fixed, viz.: To pay all damages to the family of the person injured, if shown to be actual, and to arise directly and immediately from the act or omission complained of, or to be such as must necessarily follow from such act or omission as the proximate and necessary consequence thereof. (Art. 304, Penal Code of Mexico.) (Record, page 5.)

These statutes were before the court for construction. The testimony of Mr. Velasco was merely a reiteration of the laws already in evidence; and the trial court felt competent to construe those laws without Mr. Velasco's testimony, it not appearing that he, in any instance, stated what construction had been placed upon them by the courts of Mexico. So now, the question for determination is: Did the trial court correctly construe those laws? If not, what construction should be placed upon them?

Mr. Antonio Martinez de Castro, the presiding member of the commission, charged with the work of preparing the Penal Code of Mexico, prefaces his report to the government, on March 15th, 1871 (which is published with the Penal Code) with an exposition of what he considers the purpose and reason underlying various provisions thereof. Commenting on those relating to civil liability founded on a criminal act, he says: "He who "causes damages and injury, or appropriates property not his "own, is bound to make *reparation* of the former, and *restitution* "of the latter; and in this consists the civil liability.

"To enforce compliance with this obligation, is not only strict "justice, but it is for public benefit; because it tends to repress "the commission of crime, in that his own personal interest will "effectually stimulate the injured party to make known the "crime, and render aid in the prosecution of the guilty party; and "because, as Bentham says, injury not repaired is truly a triumph "for him who causes it."

Mr. Velasco says, alimony shall cease when there is no longer a need—then, if the widow and children can subsist without that service, assistance and care of the husband and father, of which

they have been deprived through the act or omission complained of, they would not be in a position to demand alimony, and could not, therefore, ask the administration of that strict justice of which Mr. Martinez de Castro speaks. Such construction is unreasonable, strained and unjust. The amount necessary for the support of the widow and children may be taken into consideration in estimating the damages they have sustained. When considering that element of damage, along with other elements, the jury may take into consideration, also, such limitations as are consistent with the purpose of the law giving them a right to sue for damages. The defense set up, therefore, was not proven; and in the absence of such proof, the laws of Mexico were properly construed by the trial court.

CONCLUSION.

Upon the foregoing propositions, it is respectfully submitted that the judgment of the Honorable Circuit Court of Appeals of the Fifth Circuit should be reversed; and that of the trial court should in all things be affirmed.

C. A. Keller,
Mason Williams,
E. A. Atlee,
attys for Lena M. Kohler, et als.
Petitioners

(18,741)

SUPREME COURT OF THE UNITED STATES.

October Term, 1903.

No. 162.

Lena M. Slater, W. G. Slater, Jesse R. Slater,
Annie E. Slater and Henry G. Slater,
Petitioners.

-vs.-

MEXICAN NATIONAL RAILROAD COMPANY,

On Writ of Certiorari to the United States
Circuit Court of Appeals for Fifth Circuit.

Brief of Respondent in Error,
THE MEXICAN NATIONAL RAILROAD COMPANY.

In order that this Honorable Court may fully understand the contention of the Mexican National Railroad Company, we shall reproduce here, for information of this Honorable Court, our brief, upon which the case at bar was submitted to the Court of Appeals

before making reply to the alleged specifications of error by petitioners to the decision of the Court of Appeals.

The brief of Plaintiff in Error in the Court of Appeals, Respondent in this Court, omitting Court and style of case, is as follows to-wit:

This cause was instituted by defendants in error against plaintiff in error on the 17th day of November A. D. 1900, in the United States Circuit Court in and for the Western District of Texas at the Laredo Division thereof, wherein Lena M. Slater as surving wife of W. H. Slater, and as next friend of William F. Slater, Annie E. Slater and Henry G. Slater, minor children of said Wm. H. Slater, sue to recover damages for personal injuries sustained by said Wm. H. Slater on the 20th day of May A. D. 1900, while in the employ of plaintiff in error as switchman or brakeman in its yards in the City of Nuevo Laredo, Republic of Mexico, resulting in the death of said W. H. Slater on the 21st day of May, 1900. The specific allegations upon which defendant in error base the right of recovery are: 1st. That plaintiff in error was negligent in failing to furnish reasonable safe and suitable appliances, machinery and cars for the said W. H. Slater to work with and about, in that it failed to furnish cars with drawheads of same height. 2nd. That said W. H. Slater in the performance of his duty as switchman went in between two cars to couple them together, that the drawheads were not of even height or opposite to each other, but upon the contrary the the drawheads were so unequal in height that when said cars came together one of said drawheads could pass over the other, and when W. H. Slater went between said cars to make said coupling, one of which cars was standing still and the other moving, the drawheads of the moving car passed above and on top of the other, permitting the ends of the two cars to come together and mash and injure the said W. H. Slater so that he died on next day. 3rd. That defendants in error were wholly

dependent upon W. H. Slater for support. 4th. That W. H. Slater was a man of good moral character and at time of his death was earning about $125 per month and that he practically gave it all to their support and maintenance. 5th. That under the laws of Mexico it is among other things provided that the coaches and cars which enter into the make up of a train shall have drawheads of the same height so that their centers will be opposite to each other. 6th. That under the laws of Mexico the surviving wife and children are entitled to damages against the person committing the homicide. The defendant in error sets up at great length the law of Mexico, which will hereinafter be noticed in so far as the same may relate to the rights of the parties hereto, or as may be necessary for this court to notice in its dispositions.

To this petition plaintiff in error on the 4th day of December, 1900, interposed the following General and Special Demurrers:

"Now comes defendant and says that the allegations in plaintiff's petition are wholly insufficient to require further answer of this defendant, and of this it prays judgment of the Court.

"1st. And specially excepting defendant says that it affirmatively appears from the petition of the plaintiff that the wrong charge to have resulted in the death of William H. Slater occurred in the Republic of Mexico and not within the jurisdiction of this Court.

"2nd. That it affirmatively appears from the allegations of said petition that the laws of Mexico, where the wrong is alleged to have occurred, are not similar or analogious to the laws of Texas, but that the same are dissimilar and different from the laws of Texas, in this, that under the laws of Mexico, plead by plaintiffs in said petition, the parties entitled to institute and maintain suits for wrongs resulting in death, are not the same as in Texas; and in this, that they are dissimilar in many other respects made obvious by an explanations of the laws of

Mexico plead by plaintiffs; and in this, that under the laws of Texas, it is provided that in order to authorize a recovery for the death of another that the wrongful act, negligence, carelessness, unskilfulness or default causing the death of another must be of such a character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury, whereas there appears no such limitation upon the survivor under the laws of Mexico, upon the contrary, it appears that a cause of action in favor of certain named persons would exist, notwithstanding the injured person during life has extinguished said cause of action; and in this, that under the laws of Texas, in like cases, the recovery would be in "in solidum," while under the Mexican laws plead such a recovery is not intended or contemplated, but must be in installments not to exceed the amounts contributed by the deceased during life in support of the beneficiaries or persons entitled to be supported by the deceased.

"3rd. And especially further, plaintiff's petition affirmatively shows that plaintiff's right to recover damages in Mexico, if any, depends wholly upon an infraction of a penal statute of the Republic of Mexico; that to authorize a recovery under the laws of Mexico this Court must find the act or omission charged to be a violation of the penal code of Mexico, portions of which are set up in plaintiff's petition; that said laws has no extra-territorial effect, and this Court has no jurisdiction to determine such matters, or to adjudge damages based upon a penal statute of a foreign government.

"4th. And for further exception, it does not appear that said cause of action is by all parties authorized under Mexican law to maintain an action for recovery of damages, nor does it appear for the use of all persons, that might be entitled to recover damages for the wrongful killing of another, but is for the sole use of the wife and children not negativing the existence of others entitled to recover under the Mexican law and is therefore

not authorized by the Texas statute, but is in direct violation thereof, and if entertained, would subject defendant to a multiplicity of suits, contrary to the well established policy of Texas.

"5th. And for further exception defendant says, the laws of Mexico, as plead, are so unlike and dissimilar to the laws of Texas that this Court should not undertake to administer the same under the doctrine of national or interstate comity.

"Of all of which defendant prays judgment of the Court."

Which General and Special Demurrers the court overruled on December the 5th, 1901, (Trs. p. 14) to which ruling of the court plaintiff in error then and there excepted by saving its bill of exceptions (Trs. pp. 23-26). Subsequently on March 15th, 1901, in addition to its demurrers filed December the 4th, 1900, plaintiff in error presented an additional Special Exception or Demurrer to defendant in error's petition, to wit: "Defendant excepting further says that it affirmatively appears from plaintiffs' petition that the right of survivors to recover damages for personal injuries resulting in death is alimony or pension, payable in installments, and is, therefore, so dissimilar from the laws of Texas and of the common law that this court cannot administer or enforce said laws and rights" (Trs. p. 15). Which exception the Court on the 29th day of March, 1901, overruled, to which ruling the defendant then and there excepted by proper bill of exception (Trs. pp. 36 and 37).

Plaintiff in Error in addition to its demurrers answered, first, by a General Denial, and second, pleaded specially as follows:

"2d. Defendant excepting further says that it affimatively appears from plaintiff's petition that the right of survivors to recover damages for personal injuries resulting in death is alimony or pension, payable in installments, and is, therefore, so

dissimilar from the laws of Texas and of the common law that this Court cannot administer or enforce said laws and rights.

"And of this defendant prays judgment of the Court.

"MEX. NAT. R. R. CO., Deft.,
By THOS. W. DODD, Atty.

"Comes defendant again, not waiving its plea to the jurisdiction, but specially urging the same, as well as its general and special exceptions, and in the event that this Court shall overrule its said plea and exceptions, denies all and singular the allegations in said petition contained and demands strict proof thereof, and of this defendant puts itself upon the country.

"And for further plea in this behalf, defendant shows that this Court should not undertake to exercise its jurisdiction, if any in fact exists, which defendant denies, to adjudicate upon the laws of Mexico, set up as a basis of the damages sought to be recovered, because the laws are unlike and dissimilar to the laws of Texas, in this, that the right secured under the laws of Mexico to certain representatives of deceased persons to recover damages, to-wit: of surviving husbands, wives, mothers, fathers and children is the right of alimony or pension, to be paid monthly and by installments, which right ceases whenever the necessity for alimony or support no longer exists, such as a change of fortune, marriage of the surviving wife and daughters and when the boys arrive at the age of 21 years, which right and cause of action secured under the laws of Mexico is contrary to the public policy of Texas, as the laws of Texas have provided no remedy for the enforcement of such a right, and, thereiore, our Courts, neither in law or in equity, have the power and authority to create a remedy for the enforcement of such a right, and of this defendant prays judgment of the Court and puts itself upon the country.

"And again comes defendant and shows that the laws of

Mexico as pleaded, when construed in connection with other provisions of the Mexican laws securing a right of recovery in surviving wives, mothers, fathers, husband and children, for personal injuries resulting in death, to-wit: Arts. 211, 212, 213, 214, 217, 221 and 224 of the Civil Code of the Federal District, and of Arts. 1376 and 1377 of the Code of Civil Procedure, the laws of Mexico that govern, secures a right of alimony, or in the nature of a pension, and therefore secures a right of recovery unknown to the laws of Texas and for the enforcement of which no law of Texas or of the United States has been provided, and therefore this Court has no jurisdiction to grant the relief prayed, and of this defendant prays judgment and puts itself upon the country.

"And for further answer in this behalf, defendant shows that plaintiff ought not to have and maintain their action because at the time of the accident in which William H. Slater was injured and for a long time anterior thereto, he, the said William H. Slater, was in the employ of defendant company as a brakeman, and that the injury he suffered was the direct and proximate result of his, the said William H. Slater's own negligence and carelessness in the performance of his duty as such brakeman, and of this defendant puts itself upon the country."

To this answer defendant in error specially demurred as follows:

"Now comes plaintiffs by leave of Court and files this their first supplemental petition in replication to the first amended original answer of defendant, filed on March 18th, 1901, and demurs to the matters and things therein pleaded because the same constitute no defense to the cause of action.

"And especially because the laws referred to relating to alimony and pension, viz: articles of the Civil Code mentioned, are

provisions of the laws of Mexico regulating matter growing out of the marriage relation, involving the duties and obligations of parties to the marrriage contract and of parents and children; and such provisions do not show a material or substantive difference, or any difference between the laws of Texas, of the United States and Mexico, as to the nature of the right of action claimed by plaintiffs to exist under the laws of Mexico; nor do such provisions show or tend to show that the laws of Mexico on the subject of damages for injuries resulting in death are contrary to the public policy of Texas or of the United States.

"And further excepting especially, because the provisions of the laws referred to, viz: Arts. 1376 and 1377, Code of Procedure, relate to a proceeding for the purpose of obtaining a decree for temporary alimony and in no sense can they be the foundation for a defense to the action.

"And of this defendant (plaintiff) prays judgment of the Court."

Which exception the Court sustained, to which ruling plaintiff in error excepted by proper bill of exception (Trs. pp. 37, 38 and 39).

Upon this state of the pleadings both parties answered ready for trial, which trial resulted in a verdict and judgment in favor of defendants in error for the sum in the aggregate of $7,000.00.

Plaintiff in Error relies upon its assigned errors, transcript pages 73, 74, 75, 76 and 77, and which errors are as follows, to wit:

"1st. That Honorable T. S. Maxey, the Judge presiding, erred in overruling defendant general and special exceptions to plaintiff's original petition, and especially in overruling exceptions numbered one, two, three, four and (5) five.

"2nd. That the said Court erred in overruling defendant's special exception number two, filed on the ..... day of March, 1901, to plaintiff's original petition to the effect that it appeared from the laws of Mexico set up in plaintiffs' said petition that the right secured to plaintiffs to recover for personal injuries of W. H. Slater resulting in his death was in the nature of alimony or pension payable monthly or in installments, and that therefore the Courts of this country had no jurisdiction or power to enforce such a right.

"3rd. That said Court erred in sustaining plaintiff's special exception to defendant's amended original answer filed on the..... day of March, 1901, wherein defendant pleads that the Court should not undertake to exercise its jurisdiction, if any in fact exists, which defendant denies, to adjudicate upon the laws of Mexico set up as the basis of the damages sought to be recovered, because said laws are unlike and dissimilar to the laws of Texas in this, that the right secured under the laws of Mexico to certain representatives of deceased persons to recover damages, to-wit: of surviving husbands, wives, mothers, fathers and children, is the right of alimony or pension to be paid monthly and in installments, which right ceases whenever the necessity for alimony or support no longer exists, such as a change of fortune, marriage of surviving wife and daughters, and when the boys arrive at the age of twenty-one years, which right and cause of action secured under the laws of Mexico is contrary to the public policy of Texas, in that the laws of Texas have provided no remedy for the enforcement of such a right. That the laws of Mexico, as pleaded by plaintiff, when construed in connection with provisions of the Mexican laws securing a right in surviving wives, mothers, fathers, husbands and children for personal injuries resulting in death, to-wit: Arts. 211, 212, 213, 214, 217, 221 and 224 of the Civil Code of the Federal District and Arts. 1376 and 1377 of the Code of Civil Procedure, the laws of Mexico that govern, secures the right of alimony, or in the nature of a pension,

and therefore secures a right unknown to the laws of Texas, and for the enforcement of which no law of Texas or of the United States has been provided, and therefore this Court has no jurisdiction to grant the relief prayed.

"4th. The said Court erred in sustaining the exceptions of plaintiffs to defendant's offer to read in evidence to the Court and jury the testimony of Emilio Velasco, taken by deposition and returned into Court by consent of counsel, and which evidence rejected is in substance as follows, to-wit: That said Emilio Velasco is a native citizen of Mexico; that he is a lawyer in Mexico by profession and has been since January, 1860; that he was a graduate of the law school of the City of Mexico, graduating in January, 1860; (4) that he was familiar with the laws of Mexico and of the States of Nuevo Leon and Tamaulipas, in force now and that were in force for two years past, touching the right of surviving wife and children to recover damages for personal injuries resulting in death of the husband and father; (6) that the right of the surviving wife and children in a civil suit for damages where no criminal proceeding had been had, and the defendant had been absolved, it was necessary as a precedent to a recovery, that the Court trying the civil cause find that the killing or injury was a crime, as defined by the Criminal Code; (7) that the right was in the nature of alimony or pension to be paid in installment monthly for a period of time to be fixed by the Court; that the obligation to pay alimony to the wife and children, does not imply that of giving of a sum larger or smaller at once, but that of giving a pension. Alimony compromises meals, dress, habitation and assistance in case of sickness; and as regards minors, besides the necessary expenses of education of the party supported, and for the furnishing him a trade, art or profesion, honest and suitable to the sex and personal circumstances; (8) that the party obliged to give alimony complies with this obligation by assigning a competent pension, or incorporating him into his family; (9) that the obligation to furnish alimony or

support, as a consequence of civil responsibility, last all the time which the deceased ought to have lived, calculating that time according to the table of probabilities which is a continuance of article 325 of the Penal Code, bearing in mind, however, the condition of the health of the deceased; but this obligation would cease at any time when it was not absolutely for the subsistence of the parties to receive it; therefore, that the obligation ceases from the moment in which the conditions of fortune of the parties who receive alimony vary allowing them to subsist without the necessity of alimony. It ceases with the wife and daughters when they marry, and with the sons when they arrive at twenty-one years of age; and it ceases when circumstances are produced that, according to law the obligation of giving would have ceased on part of the deceased if he had lived; (10) that civil responsibility is based upon an infraction of the Criminal Code. It is the infraction that gives, or engenders, civil responsibility; (11) in case that the deed of fault or negligence, or to the omission which caused the injury, he is coauthor of the offense or fault, and his representatives can not recover; (12) that the wife and children have no right to any indemnification against a railway company on account of injuries from which resulted the death of the husband and father, when the accident in which said injury occurred was caused by the fault, or negligence, or omission of the one who suffered the injury, or if he contributed in any way with his fault, negligence or omission to the accident.

"5th. The said Court erred in refusing in giving in charge to the jury defendant's special request No. 1, and which was as follows: "The jury are instructed to find a verdict for the defendant."

"6th. The Court erred in refusing to give in charge to the jury defendant's special charge, in words as follows: 'The jury are instructed that William H. Slater, for whose wrongful injury and death plaintiffs sue, in entering to the service of defendant, assumed all the risks ordinarily incident to said service, and in

this connection you are instructed that the risks assumed by him include all open and visible defects. And if you believe from the evidence that the said William H. Slater was injured while undertaking to remove a pinched pin and link, or pin or links, with knowledge of their conditions upon a moving car, then in that event you will find for the defendant.

"7th. The said Court erred in refusing to give in charge to the jury the following special instruction requested by the defendant, to-wit: 'The jury are instructed that if they believe from the evidence that William H. Slater, for whose injury and death plaintiffs sue, was injured and killed by reason of the fact that the drawheads of the cars to be coupled together were of uneven height, and that such condition was known to William H. Slater, and that he, the said William H. Slater, was careless, or that he, the said Slater, in trying to couple the said cars failed to use that degree of care and caution usually adopted by a prudent person in the performance of said service, then in that event, he was guilty of contributory negligence, and you will find for the defendant.

"8th. The said Court erred in refusing to give in charge to the jury defendant's special instruction in words as follows, to-wit:

" 'The jury are instructed that if they believe from the evidence that William H. Slater, for whose injury and death plaintiffs sue, was attempting to couple two cars together, and that said drawheads of both had in them pinched pins and links, and that said physical condition was known to said William H. Slater, and that in attempting to make such coupling under such conditions, was inconsistent with that ordinary care and prudence that would be used by an ordinarily prudent man under similar circumstances, then you will find for the defendant.'

"9th. The said Court erred in refusing to give in charge

to the jury defendant's special instruction in words as follows: to-wit:

"'The jury are instructed that in event you find in favor of plaintiffs, then you will by your verdict, find: first, what sum of money, if any, the said William H. Slater, at the time of his death, was contributing toward the support of his wife and his children (plaintiffs in this suit) per month, specifying the amount in dollars and cents; second, you will find what proportion of said sum was contributed by said William H. Slater to the said Lena M. Slater, and what proportion to each of the minor children, and in this connection you are instructed that the said sum in the aggregate must not exceed the sum of money he contributing to their support during his, W. H. Slater's life and at and before his death.

"10th. The said Court erred in giving in charge to the jury that portion of its main charge in words as follows, to-wit:

"'The damages then must be measured by the pecuniary—money—injury to the respective plaintiffs. They are not entitled to recover anything for mental pain which they may have suffered on account of the death of the deceased, or for physical or mental suffering which the deceased himself may have endured. If he had been simply injured and not killed, and brought suit himself, the rule would have been otherwise, for in that case the law would permit him to recover, if entitled to recover at all, damages for physical and mental pain. But in cases of this kind damages, as before stated, must be measured by the pecuniary standard, that is the money value of the life of the deceased to the surviving wife and children. And the jury, acting upon their sound and deliberate judgment, based upon facts and circumstances in evidence, and their own knowledge, experience and sense of justice, may give such damages to the plaintiffs as they may think proportionate to the injury resulting to them from the death of deceased. See 75 Texas, 67 and 69.'"

The questions involved are, 1st, that the trial Court erred in overruling plaintiff in error's General and Special exceptions urged to defendants in error's petition filed December 4th, 1900, and filed March 18th, 1901. The general and special demurrers necessarily involve, 1st, the laws of Mexico, the place where the injury occurred, and their proper construcion; 2nd, the nature of the right secured to surviving widows and children to damages; 3rd, the power and authority of the Circuit Courts of the United States to administer the laws of Mexico and grant the right secured by the laws of Mexico under such circumstances; 4th, manner of proving and construing the laws of a foreign country. Not only do these questions arise from the exceptions urged by plaintiff in error to defendants in error's petition, but they arise out of plaintiff in error's special defenses pleaded in bar of defendants in error's right to recover and which is fully specified in our 3rd error assigned, and which the trial Court sustained exceptions to (Trs. p....).

The next question involved arises out of the action of the Court in sustaining exceptions of defendants in error to plaintiff in error reading in evidence to the Court and jury the testimony of Emilio Velasco, a man learned in the laws of Mexico, as to the laws of Mexico and the nature of the right in survivors of deceased persons through injuries wrongfully sustained, and as to proper construction of the laws of Mexico affecting such right.

The other questions involved arise out of the refusal of the Court to give in charge to the jury certain special charges requested and refused, and to the charge of the Court given.

Before presenting our views why we believe the learned trial judge committed error in overruling plaintiff in error's general and special exceptions to defendants in error's petition or complaint and in sustaining defendants in error's special exceptions to plaintiff in error's answer as pled, we ask this Court's consideration to the action of the trial Court in sustaining defendants in

error's objection to the testimony of Emilio Velasco as taken by deposition. The objection to this testimony is on the ground that the statutory law of Mexico, as pled, is best proved by the statutes themselves and the statutes having been offered in evidence, the depositions of the witnesses named as to what the law is, is inadmissible (Trs. p. 41). This objection the Court sustained and refused to allow same read to the Court or jury. This action is manifest error as we conceive the law to be: 1st. In that it assumes that the statutory law of Mexico is all of the law in cases of the character of the suit at bar affecting the right of a recovery. 2nd. That it assumes that it is incompetent to offer testimony of one learned in the laws of a foreign tongue and country, as to what the law is, whether written or unwritten; and 3rd. That it assumes that if it is incompetent to offer testimony in the nature of expert evidence as to the proper construction of a statute in a foreign tongue and country.

We submit, first, that it is elementary that foreign unwritten laws customs and usages may be proved by parol evidence. Green Leaf on Evidence, 13th Ed. P. 636 and section 488 and authorities cited.

2nd. That the usual course is to make proof by the testimony of competent witnesses, learned and instructed in the laws, customs and usages of such country. See above authority.

REMARKS.

It will be observed by the Court that the only evidence offered as to the laws of Mexico having application to the facts pled or right of plaintiffs and defendant is to be found in transcript page 21, where it is agreed by counsel upon both sides that the translations of the Laws of Mexico, as set up in plaintiffs' petition and which translations are herewith filed and marked Exhibit "A" and "B" for identification with the records in this case are correct

translations of the laws they purport to be translations of, taken from the respective Codes in said petition mentioned. And it is further agreed that the laws described in defendant's original answer and plaintiffs' supplemental petitition are the laws of Mexico having aplication to this case.

This agreement as quoted constitute the testimony in relation to the laws of Mexico, It in no manner negatives or tends to negative the existence of written or unwritten laws of Mexico having application to the question involved other than the laws pleaded. Under this state of the facts and proof, the testimony of Emilio Velasco, a man learned in the laws of Mexico, was pertinent and proper as to the nature of the right in survivors to recover damages in cases of tort. The evidence was offered both to the Court and jury and it was admissible to be considered by the Court, as all matters of law are primarily referable to the Judge in order to enable him to properly instruct the jury in any particular case. See Greenl. on Evidence, Sec. 486.

We further submit that it was competent evidence, even granting that its purpose was to prove by an expert, the existence or prevailing construction of the statutes of Mexico, a foreign country, and whose language is different from ours. See Kline vs. Baker, 99 Mass 254.

In Baron de Bode vs. Reginam, 10 Jur. 217, Lord Denman C. J. in discussing a similar question says: "I think that credit must be given to the opinion of legal men, who are bound to know the law of the country in which they practice, and that we must take from them the account of it whether it be unwritten law, which they may collect from practice, or the written laws, which they are also bound to know. The instrument (or statute) itself might frequently mislead and it might be necessary that the knowledge of the practitioner should be called to show that the sense in which the instrument (or statute) would naturally be

construed by a foreigner is not its true legal sense." This reasoning of one of England's ablest jurists, may not in its entirety be correct, but it illustrates the importance of the evidence of men skilled in the science of the law of a foreign tongue as an aid to our Courts when called upon to construe foreign statutes, translations of which are offered to determine the rights. We admit that the trial Judge had the discretion to reject the offered testimony and proceed upon his own knowledge of the foreign laws, and that the judgment will not be reversed for that cause unless it should appear that the Court was mistaken as to those laws. See State vs. Rood, 12 Vt. 396. In support of our theory that the Court trying this case was mistaken as to the Laws of Mexico, that must be conceded as determining the rights of the plaintiff and defendant, we quote the record as follows: The trial Judge upon the right of plaintiffs instructed the jury that "in cases of this kind the damages, as before stated, must be measured by the pecuniary standard that is, the money value of the life of the deceased to the surviving wife and children; and the jury acting upon their sound and deliberate judgment, based upon facts and circumstances in evidence, and their knowledge, experience and sense of justice may give such damages to the plaintiffs as they may think proportionate to the injury resulting to them from death of the deceased." (Trs. p. 69). In another portion of the charge the learned Judge says: "In cases of this kind the damages are measured solely by the pecuniary injury to which the respective parties are entitled, including the loss of prospective damages." This measure of recovery is the enforcement of the right fixed by the law of Texas and not a measure of right secured under the laws of Mexico. Arts. 311, 318, 319, 320 and 325, Penal Code Book 2, Laws of Mexico pled by plaintiffs fix the right of survivors in cases of homicide wrongfully done. (Trs. pp. 6 and 7.) Article 318 specifies what damages are comprehended as civil responsibility for a wrongful homicide, and comprehends "the support not only of the widow, descendants and ascendants of the deceased, who were being supported by him, he being under legal obligations

to do so, but also to the posthumous descendants that he may leave."

Art. 319 reads: "The obligation to furnish support shall last during all the time that the deceased might have lived if the homicide had not killed him, and that time shall be calculated by the Judge according to the table at the end of this chapter, but taking in consideration the state of the health of the deceased before the homicide was committed. As limitation of this rule the obligation shall cease: 1st. At whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it. 2nd. When those beneficiaries shall get married. 3rd. When the minor children become of age. 4th. In any other case in which, according to law, the deceased, if alive, would not be required to continue the support." Now the testimony rejected is that of an expert, one skilled in the science of the laws of Mexico, and is "that the right was in the nature of alimony or pension to be paid in installments monthly, for periods of time fixed by the Court; that obligation to pay alimony to the wife or children, does not imply that of giving a sum larger or smaller at once, but of giving a pension. That the party obliged to give alimony, complies with the obligation by assigning a competent pension, or by incorporating him into his family. That the obligation to furnish alimony or support as a consequence of civil responsibility lasts all the time that the deceased ought to have lived, calculating the time according to the table of probabilities, which is a continuance of Article 325, Penal Code, bearing in mind, however, the condition of the health of the deceased: but that this obligation would cease at any time when it is not absolutely necessary to the subsistence of the parties who receive it; therefore the obligation ceases from the moment in which the condition of fortune of the parties who receive alimony vary allowing them to subsist without the necesity of the alimony. It ceases with the wife and daughters when they marry, and with sons when they become of age; and it ceases when circumstances are produced that, according to law,

the obligation of giving would have ceased on the part of the deceased if he had lived. In case the injured party has contributed to the deed or default or negligence or to the omission which caused the injury, he is coauthor of the offense or default and his representatives cannot recover. That the wife and children have no right to any indemnification against a railway company on account of injuries from which resulted the death of the husband or father when the accident in which the said injury occurred was caused by the fault or negligence or omission of the one who suffered the injury or if he contributed in any way with his fault negligence or omision to the accident."

We have quoted the charge of the Court and the law of Mexico having reference to and fixing the right in survivors to damages, and the testimony of the witness whose evidence the Court rejected, in order to demonstrate: 1st. That the trial Court erred in rejecting said evidence, because he was mistaken as to a proper construction of the laws of Mexico pled, and because he, the trial Court, really ignored the Mexican Laws in so far as they relate to the right secured to surviving wives and children to a support of the one wrongfully causing the death of their deceased husband and father.

We confidently submit that our fourth error is well taken, and such error requires a reversal of the judgment of the lower Court.

This brings us now to a consideration of our first and second and third errors that we propose to submit together, as they all three refer to the same subject and may well be considered together by us and this Court.

Upon the questions presented by our three errors assigned we submit: 1st. That it affirmatively appers that the injuries resulting in the death of W. H. Slater occurred in Nuevo Laredo, Mexico, and that therefore the rights of the plaintiffs who sue to

recover damages must be measured by the Laws of Mexico the country where the accident occurred. 2nd. That in this character of suits the *lex loci* absolutely governs as to the right. 3rd. That the laws of a foreign country have no extra-territorial power and effect, and cannot confer upon the Courts of this country a power denied by the law creating our Courts. 4th. That the Circuit Courts of the United States are Courts whose jurisdiction and powers are defined by the statutes of the United States. 5th. That the United States Circuit Courts, as law courts, have no jurisdiction, power or authority to administer equitable relief, or to adjudicate upon rights not capable of being enforced by a judgment final securing such right.

These five propositions will certainly be conceded to be correct principles, and bearing these in mind we submit that the exceptions of plaintiff in error to defendants in error's petition are well taken, because it affirmatively appears from the petition that the wrong charged to have resulted in the death of Wm. H. Slater occurred in the Republic of Mexico and not within the jurisdiction of the United States; second, because it affirmatively appears from the laws pled by the defendants in error that the laws of Mexico, where the wrong occurred, are not similar or analogious to the laws of Texas, but upon the contrary are dissimilar and different from the laws of Texas; third, that it affirmatively appears from the laws of Mexico set up in defendants in error's petition that the right of survivors to recover damages for personal injuries resulting in death is in the nature of alimony or pension, payable in installments and is therefore so dissimilar from the laws of Texas and of the Common Law that the Courts of the United States on their law side, cannot administer or enforce said laws and rights.

Under these propositions it becomes necessary to examine the laws of Mexico set up by the defendants in error. The provisions of the laws of Mexico relating to the right, as pled, are to

be found in the transcript on pages 6 and 7, and may include articles 308 to and including Art. 319, Penal Code, Book 2, as described in the defendants in error's petition. Arts. 308, 309, 310 and 311 are really immaterial or rather, in fact, cannot aid the Court in properly answering the questions raised by the exceptions presented. Art. 318 reads: "The civil responsibility that grows out of a homicide done without right, or justification, comprehends the payment of the indispensable expenses of the burial of the body (not involved here), the expenses and necessary charge made for the care of the deceased, (not involved here), the damages that the homicide caused the property of the deceased, (not involved here), and the support not only of the widow, descendants and ascendants, who were being supported by him, he being under legal obligation to do so, but also the posthumous descendants that he may leave.

The Court will note that the obligation here involved is denominated a support, not "damages exemplary as well as actual." It will aid in arriving at a correct construction of article 319 that reads: "The obligation to furnish support shall last during all the time that the deceased might have lived if the homicide had not killed him, and that time shall be calculated by the Judge according to the table at the end of this chapter, but taking into consideration the state of the health of the deceased before the homicide was committed. As limitation of this rule the obligation shall cease: 1st, at whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it; 2nd, when those beneficiaries get married; 3rd, when the minor children become of age; 4th, in any other case in which, according to law, the deceased, if alive, would not be required to continue the support."

These provisions of the law of Mexico define the right. It expressly declares it to be an obligation to support, not to "pay damages in such sum as a jury may think porportioned to the injury resulting from such death" as under our laws. Not only is it

an obligation to give support, but it declares that such obligation "shall last during all the time that the deceased might have lived if the homicide had not killed him, to be calculated by the Judge according to the table at the end of this chapter, but taking into consideration the state of the health of the deceased before the homicide." The obligation to give support by this same statute, declares that the obligation shall cease: "1st. At whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it." This is a limitation upon the right of survivors to a support, or to damages growing out of the wrongful killing. It excludes the theory that a judgment in *solidium* can be given in the enforcement of the right secured. This is the natural construction of this statute that must be conceded to govern and fix the right of the survivors, wife and children to a support. Especially is this construction the natural result when considered in connection with the three remaining provisions expressly declared to be a limitation upon the right secured. They are: 1, when those beneficiaries get married; 2, when the minor children become of age; 3, in any other case in which, according to law, the deceased, if alive, would not be required to continue the support. This statute of Mexico evidently does not contemplate the giving a sum larger or smaller at once, said sum to be ascertained by the Court or jury, as provided by Art. 3027 R. S. of Texas. Art. 3027 reads: "The jury may give such damages as they may think proportioned to the injury resulting from such death; and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict." The want of analogy between our law and those of Mexico, relating to the right, is apparent. The dissimilarity between these rights is so manifest, that we would not discuss them were it not that the trial Court and eminent counsel for defendants in errors assert that the right secured under the Mexican laws pled, is substantially the same as the right secured to the survivors under the statutes of Texas. If the language of the Mex-

ican statute be given its natural construction, according to the English thereof admitted to be correct, then it means that a surviving wife and children of one wrongfully killed by another, is entitled to a support which support will be discontinued whenever it shall become unnecessary, when the widow and daughters marry, and when the children become of age. This secures a right that in the nature of our Courts, a court of law cannot take jurisdiction of or enforce by a judgment. To give this Mexican statute a construction that harmonizes its provisions as to the right secured with the laws of Texas, every known rule of construction both of law and grammar, must be disregarded. The original statute is in the Spanish language, translations are admitted to be true and correct as pled by the defendants in error, and in construing these laws we must adopt the rules of construction that "words in common use are to be taken in their natural, plain, obvious and ordinary signification." This fundamental rule must be done violence or these provisious create a right unknown to our laws and which our courts are wholly incompetent to enforce, because the process, judgment and proceedings known to our courts are not adapted to give such relief or enforce such rights.

The Court will note that we do not in this presentation question the able opinion of this Court in the case of Evey vs. Mexican Central Ry. Co., but we submit that the case at bar is clearly distinguishable from the Evey case. In the Evey case this Court construed the statutes or laws of Mexico, as to the right secured to persons in Mexico on account of personal injuries wrongfully committed, a purely transitory action at Common Law. The wrong in that case was committed by a citizen of the United States operating a railroad in Mexico to a citizen of Texas and of the United States under a contract of employment made in Texas. In the case at bar this Court is called upon to enforce a right that had no existence at Common Law, but that absolutely depends upon the right defined and fixed by a foreign law, to wit, the law

of Mexico more than once quoted in this brief. It is indisputable that in the character of cases at bar the cause of action having occurred in a foreign country, the right and liabilities of the parties and their extent are governed by the laws of such foreign country. The right secured to surviving wives and children under the laws of Mexico is in the nature of alimony or pension and does not contemplate the giving of a smaller or greater sum at once. The broad and liberal rule announced by Justice Miller in Dennick vs. Ry., 103 U. S. 11, "that wherever, by either the Common Law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any Court which has jurisdiction of such matters and can obtain jurisdiction of the parties," cannot be successfully invoked in the case at bar. The right is not such a right, as our Courts are adapted to enforce, and therefore it has no legal jurisdiction over such matters. The right secured is such a right as may be denominated civil and equitable. The United States Circuit Courts on the law side have no such jurisdiction, power or authority. In Dennick vs. Ry., supra, the right of action accrued under the law of New Jersey. It was such a fixed right, not inconsistent with the laws of New York and one that could, without doing violence to the laws of New Jersey, be enforced by the Courts of New York. Is the right secured to the defendants in error, as survivors of W. H. Slater, under the laws of Mexico, one that the Courts of this country can enforce by judgment? This must be answered in the negative, or the limitations fixed in the right by the same laws must be disregarded. In a number of states of the United States, statutes giving a right of action to certain representatives of deceased persons wrongfully killed, or for injuries resulting in death, have prescribed limitations as to amounts; and no Court, either Federal or State, in suits brought in another jurisdiction, has ever ignored such limitations. The statutes of Illinois limit the recovery of widows, children or next of kin to $5,000.00. In Morris Adm'r vs. Chicago R. I. & P. R. R. Co., 19 Am. & Eng. Ry. Cases 180, the Court of

Iowa took jurisdiction, but gave effect to the limitations fixed by the Illinois statute, the place where the cause of action occured. In another class of cases the same principle is enforced. An administrator under the laws of Missouri is prohibited from instituting, maintaining or prosecuting an action for damages resulting from the wrongful act or omission of another in causing death of his intestate. The Supreme Court of Kansas, 19 Am. & Eng. Ry. Cases 184, holds that an administrator appointed under this Missouri law cannot prosecute such a suit in Kansas, and because he could not do so in Missouri, the state of his appointment.

We submit that our 1st. and 2nd errors are well taken and that this Court should reverse and dismiss this case.

Our 3rd error involves the same questions of law, and we submit that the same is well taken and that this cause should be reversed and dismissed.

Our 5th error is in substance that the Court erred in not instructing a verdict for defendant, the plaintiff in error. We submit that for reasons given under our first three errors, this error is well taken and that the case should be reversed and dismissed.

Our 6th, 7th and 8th errors involve questions so intimately related to each other as to justify their submission together.

Our 6th error is, that the Court erred in refusing to give in charge to the jury defendants special charge in words as follows: "The jury are instructed that William H. Slater, for whose wrongful injury and death plaintiffs sue, in entering into service of defendant, assumed all the risks ordinarily incident to said service, and in this connection you are instructed that the risks assumed by him include all open and visible defects. And if you believe from the evidence that said W. H. Slater was injured while undertaking to remove a pinched pin and link, or pin or link, with

knowledge of their conditions upon a moving car, then in that event you will find for defendant." See Bill of Exceptions No. 6. (Trs. pp. 65 to 71.)

Our 7th error is, that the Court erred in refusing to give in charge the following special instruction: "The jury are instructed that if they believe from the evidence that William H. Slater, for whose injury and death plaintiffs sue, was injured and killed by reason of the fact that the drawheads of the cars to be coupled together were of uneven height, and that such condition was known to William H. Slater, and that he, the said W. H. Slater, was careless, or that he, the said Slater, in trying to couple the said cars failed to use that degree of care and caution usually adopted by a prudent person in the performance of said service, then in that event he was guilty of contributory negligence, and you will find for the defendant."

Our 8th error is, that the Court erred in refusing to give in charge the following special instruction: "The jury are instructed that if they believe from the evidence that W. H. Slater, for whose injury and death plaintiff sue, was attempting to couple two cars together, and that said drawheads of both cars had in them pinched pins and links, and that physical condition was known to said William H. Slater, and that in attempting to make such coupling under such conditions was inconsistent with that ordinary care and prudence that would be used by an ordinarily prudent man under similar circumstances, then you will find for defendant."

We submit that when a person enters the service of another he assumes all the ordinary hazards incident to the service to be performed. And this includes all risks which are open to common observation. Union Pacific Ry., vs. Daniels, 152 U. S. 688; M. P. Ry., vs. Somers, 78 T. 441; T. P. Ry., Geiger, 79 T. 19; G. C. & S. F. Ry., Co , vs. Brentford, 79 T. 625; St. L. A. & T. Ry., vs. Lemon, 83 T. 146; G. C. & S. F. Py., Co., vs. Schwable,

1 T. C. A. 577; Railway vs. Ringle, 9 T. C. A. 322; Ely vs. S. A. & A. P. Ry., Co., 15 T. C. A. 511.

The questions here involved is, did the Court err in refusing to give the special charges? If the main charge of the Court as applied to the facts cover the point or principle, then there is no just complaint, otherwise it is a fatal error and demands a reversal. It, therefore, becomes important to first consider the charge of the Court as given, in so far as it relates to the question involved as applied to the undisputed facts in evidence.

The Court instructed the jury: "That it was the duty of the defendant to furnish deceased, William H. Slater, cars which enter into the make up of the train about which he was engaged, having drawheads of the same height, so that their centers would be opposite to each other and you will determine from a consideration of the testimony whether the cars about which deceased was working at the time of his injuries, were constructed in accordance with the requirements (of) Mexican Law. If such cars were constructed, in reference to their drawheads, as required by the Mexican statute, then plaintiffs would not be entitled to recover in this case. You are further instructed that although the cars in question were defectively constructed, that is to say, that although they did not meet the requirements of the Mexican Law in reference to the adjustment of their drawheads, that fact alone would not render defendant liable to damages to plaintiffs, and you would still have the further question to determine, whether the injuries of the deceased were the direct result of such defective cars. Hence to authorize a verdict in favor of plaintiffs, you must be satisfied from the testimony: 1, that the cars in reference to the drawheads, were not constructed according to the requirements of the Mexican Law; and 2nd, the injuries of the deceased resulted directly from such defective construction.

"It is insisted by the defendant that the deceased was guilty of negligence which contributed to the injuries resulting in his

death and on that account plaintiffs are not entitled to recover. In reference to this point, you are instructed that the law required the deceased to look out for his own safety, in order that harm should not come to him in the discharge of his duties. If, then, while performing his duties as brakeman, he failed to excercise that degree of care and caution, which a person of ordinary prudence would usually exercirse under similar circumstances, and if from such a want of care his injuries resulted, the plaintiffs would not be entitled to recover in this suit. And you are further instructed that if in coupling the cars in question at the time deceased was hurt was dangerous, and the deceased knew of the danger incident to the business, and notwithstanding attempted to couple the cars and was hurt in the attempt, in such a case the plaintiffs would be debarred of a recovery. The question on the one hand, as to the construction of the cars and adjustment of drawheads, and, on the other hand, as to the negligence of deceased is submitted solely to your determination, and you will solve it to your satisfaction from a consideration of all the facts and circumstances in evidence." (Trs. pp. 67 & 68). Defendant's Bill of Exceptions No. 6.

The facts are undisputed that W. H. Slater, the deceased, was injured and killed while attempting to couple two of defendant's cars. That the drawheads of said cars were of an uneven height. That deceased knew the said cars were of an uneven height; that both of said cars had in them pinched links and pins; that deceased knew the pins and links were pinched, but he said that he could get them out; that he boarded the moving car as it was approaching the other car; the testimony or facts conflict as to the position Slater was in as the cars came together, and as he attempted to make the coupling. One or more witnesses say that he walked in between the cars as they came together to make the coupling. The others say that he was sitting on the beam of the moving car trying to remove the pinched link and pin, when he was injured. The proper manner to make such a coupling was to

step in side ways, as the cars came together. Slater had one thigh crushed and broke and the other slightly mashed; and if he had been standing on the ground he would have been caught across the hips. See evidence of Galbraith, Lattig, Pedraza and Spencer (Trs. pp. 51 to 62). Defendant's Bill of Exceptions No. 5.

Under these three errors that go to the Court's refusal to give our special charges, we submit that it is always error to refuse to give a charge that is applicable to each statate of facts which the evidence tends to establish, pro and con; and that a special request so framed should be given, unless the charges already given fully cover the same law as applied to the facts. Jacobs vs. Lotty, 76 T. 348.

The Court's charge as given is absolutely silent as to the risks assumed by the deceased in reference to his knowledge of the defect in reference to the pinched pins and links. The charges requested covered these defects in the Court's main charge, and are in every particular applicable to the facts established by the evidence. There is absolutely no reference in the Court's charge given to the conditions existing by reason of the pinched links and pins, and the jury was therefore justified in ignoring the view of defendant's defense based upon the deceased's knowledge of such condition. The charge refused as contained in our 8th error sharply presents this defense, and with all fairness to the plaintiffs. We submit that these charges should have been given and that the Court's refusal to give them was error, in that it virtually ignored a part of the facts relied upon to establish negligence on part of the deceased that contributed to his injury. Specially is this error manifest under the laws of Mexico as we prosposed to prove by Emilio Velasco, a person skilled and learned in the laws of Mexico and whose evidence the Court rejected. (Trs. pp. 40 and 41.) This evidence is: "In case the injured party has contributed to the deed or fault or negligence or to the omissions which caused the injury, he is co-author of the offense or fault and his representatives cannot recover. That the wife and chil-

dren have no right to any indemnification against a railway company on account of injuries from which resulted the death of the husband or father when the accident in which the said injury occurred was caused by the fault or negligence or omission of the one who suffered the injury or if he contributed in any way with his fault, negligence or omission to the accident." This testimony was rejected but it was clearly not subject to the exception, as it gives a rule of right in Mexico not provided for in the statutes read in evidence.

Our 9th error is, that the Court erred in refusing to give in charge to the jury defendant's special instruction as follows: "The jury are instructed that in the event you find in favor of plaintiffs then you will by your verdict find: first, what sum of money, if any, the said William H. Slater, at time of his death, was contributing toward the support of his wife and his said children (plaintiffs in this suit) per month, specifying the amount in dollars and cents; second, you will find what proposition of said sum was contributed by said William H. Slater to the said Lena M. Slater and what proportion to each of the minor children and in this connection you are instructed that the said sum in the aggregate must not exceed the sum of money he contributed to their support during his, W. H. Slater's life and at and before his death."

This charge was dratted specially to cover the measure of plaintiffs' rights as survivors of W. H. Slater under the Mexican Laws, that we have heretofore shown govern the measure of plaintiff's recovery, granting that it involves such a right as the Courts of Texas, either State or Federal can administer. Arts. 318 and 319 of the Mexican Laws, transcript pages 6 and 7, fix the right and its extent of plaintiffs and the charge requested was evidently sufficiently suggestive to the Court as to the proper measure of damages under the Mexican Laws, whether in all particulars full enough. It should have been given as requested, or at least given modified as the Court thought necessary. It, as

requested, was notice to the Court that its charge upon the subject was objected to. See Earl vs. Thomas, 14 Texas 592; Kirby vs. Estill, 75 T. 488; Railway vs. Hodges, 76 T. 93; Freyby vs. Tierman, 76 T. 291.

Our 10th error is, that the Court erred in charging the jury as follows: "The damages then must be measured by the pecuniary —money—injury to the respective plaintiffs. They are not entitled to recover anything for mental pain which they may have suffered on account of the death of the deceased, or for physical or mental sufferings which the deceased himself may have endured. If he had been simply injured and not killed and brought suit himself, the rule would have been otherwise, for in that case the law would permit him to recover, if entitled to recover at all, damages for physical and mental pain. But in cases of this kind damages, as before stated, must be measured by the pecuniary standard, that is, the money value of the life of the deceesed to the surviving wife and children, and the jury, acting upon their sound and deliberate judgment, based upon the facts and circumstances in evidence, and their own knowledge, experience and sense of justice, may give such damages to the plaintiffs as they may think proportionate to the injury resulting to them from the death of deceased." See 75 Tex. 67-69.

This charge is erroneous in that it in so far as it can be said to announce a rule of law, gives a measure of damages applicable to the laws of Texas and of the United States, and not the law of Mexico, applicable to the case made.

The Court will note that this charge was not specifically excepted to, but it was inferentially excepted to by the request refused in our 8th error. Bill of Exception No. 7. (Trs. pp. 71 to 73.)

The rule announced by the Supreme Court in Tucker vs. United States 151 U. S. 170 and in St Clair vs. United States,

154 U. S. 134-153 and in Humes vs. U. S., 170 U. 210, 213, has no application here, because that rule is based upon the theory that the Court gave no erroneous instructions. Our Bill of Exception No. 7, (Trs. pp. 71-73), is not confined to that particular part of the record, but this Court will, in cases where the error is apparent upon any part of the record, review same whether it is found in the bill or not. Suydam vs. Williamson 20 How 427.

We submit that the chrge is subject to the error and that this Court should reverse the case.

Our main contention is that the record in this case disclose a system of laws governing the rights of the parties, that the Courts of Texas or the Courts of the United States have no jurisdiction to enforce. That the Circuit Courts of the United States in the exercise of their Common Law jurisdiction, cannot enforce any right not capable of being enforced by a judgment that shall be final and conclusive between the parties.

The case at bar being in favor of the surviving wife and children for recovery of damages resulting to them by reason of the iujury and death of deceased, is the assertion of a right that does not survice at Common Law. The right, therefore, must be determine by the *lex loci*, and not by the *lex fori*. The accident having occurred in Mexico, it was necessary for the plaintiffs to plead the laws of Mexico, because those laws determine the right of plaintiffs and their extent. This principle is so well established that we deem it unnecessary to cite authority.

The uniform tenor of the decisions of the Supreme Court of Texas, is that rights acquired in foreign jurisdictions depend for their validity, nature and extent upon the laws of the place where they occurred, and that when pleaded and proved such laws will be regarded as the rule of decision. Crosby vs. Huston, 1 Texas 203; Andrews vs. Hoxie, 5 T. 171; Willard vs. Condint, 10 T. 213; Sadler vs. Anderson 17 T. 245; Bradshaw vs. Mayfield 18 T. 21;

Powell vs. De Blam, 23 T. 66; James vs. James 81 T. 373, 381: Prochiller Bronson 50 T. 361. This same principle prevails in the United States Circuit Courts. See Railroad Co., vs. Babcock, 154 U. S. 190, where the Supreme Court by Justice White in discussing a similar question says, "the statutes of another State have, of course, no extraterritorial force, but rights acquired under it will always in comity be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, *will govern as to the right of action;* while all that pertains merely to the *remedy* will be controlled by the law of the State where the action is brought." The Supreme Court of Ohio, in the case of Alexander vs. Penna Co., 30 N. E. 69 in a suit for damages for personal injuries sustained in Pennsylvania where the contract was made and to be performed, say in Ohio the plaintiff was not the fellow servant of the "gang boss" whose alleged negligence caused the injury, while under the Pennsylvania decisions pleaded and proved by defendant, they were fellow servants, held that plaintiff could not recover. In other words, the law of Pennsylvania was held to fix the right and the limitations thereof. In our research through the dicisions of the United States Supreme Court we have found no case holding a contrary doctrine. This is the rule of decision in the States of Alabama, Mississippi, Tennessee and Georgia. In fact in every State we have investigated. The cases decided by this Court, Evey et. al vs. Mexican Central Ry. Co., do not announce any principle inconsistent with our contention in this case. If the right secured to defendants in error is one this Court cannot enforce, then our demurrers were well taken, and should have been sustained. If however the demurrers were properly overruled, then the right and measure of recovery must conform to the laws of Mexico, and not to the laws of Texas. See Authorities cited.

In conclusion we submit that this Court should reverse and

dismiss this suit, or reverse and remand with instructions to the Court to try the case according to the Mexican laws.

BRIEF AND ARGUMENT IN REPLY TO PETITIONERS PETITION FOR CERTIORARI, BRIEF, ETC., AND IN SUPPORT OF THE DECISION AND OPINION OF THE CIRCUIT COURT OF APPEALS.

This Court will note that the respondent, the Mexican National Railroad Company assigned ten separate and distinct errors to the judgment and proceedings in the trial court. Of these errors the Hon. Circuit Court of Appeals on writ of error practically sustains the first, second, third and fourth, failing to discuss or dispose of the fifth, sixth, seventh, eight, ninth and tenth errors for the reason that their consideration was unnecessary in view of the conclusions reached in the consideration of the first four errors assigned. While we confidently submit that the disposition of the Hon. Circuit Court of Appeals is correct, we do not desire to be understood as waiving any of the errors assigned.

The first question arising upon the record in this Court, is; has this Court jurisdiction to revise and review the decisions and judgments of the Circuit Court of Appeals in the class of cases to which this case belongs?

The jurisdiction of the Circuit Court as shown by petitioners original petition record page 2, depends wholly upon diverse citizenship of plaintiffs and defendant.

The 6th section of the Act of Congress entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes." In so far as pertinent to the questions here involved, reads: "And the judgments and decrees of the

Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

This Court through the Chief Justice in the case of Benjamin vs. City of New Orleans, 169 U. S. 161 to 164, upon a similar question say: "But the jurisdiction was none the less dependent on diverse citizenship as between complainant and defendant because it might be defeated if complainant did not bring himself within the restrictions. The diverse citizenship of the assignors of the claims was not another ground of jurisdiction than the diverse citizenship of complainant and defendant, and the 6th section in referring to cases in which the jurisdiction is dependent entirely on diverse citizenship between the opposite parties to the suit or controversy refers to cases where no other distinct ground of jurisdiction is relied on. It frequently happens that more than one ground is set up as between the same parties, and also, separate and different grounds in respect of one or more of several parties. We think the case within the intent and meaning of that section, clearly belongs to the class in which the judgments and decrees of the Circuit Court of Appeals are made final."

Justice Gray speaking for this Court in the Press Publishing Company vs. Monroe, 164 U. S. pages 105-106, says, in the concluding paragraph of the opinion that, "the jurisdiction of the Circuit Court having been obtained and exercised solely because of the parties being citizens of different states, the judgment of the Circuit Court of Appeals was final."

This Court in the case of Borgemeyer vs. Idler, 159 U. S. 408-415, held to the sameeffect and the same doctrine is announced in a number of cases not necessary to cite. We submit

under these decisions of this court that this case is clearly within the class of cases wherein the judgments and decrees of the Circuit Courts is final, and that this Court therefore has no jurisdiction to revise the decision of the Circuit Court of Appeals in the case at bar.

There are various reasons why, as the representative of the respondant, the plaintiff in error in the Circuit Court of Appeals, we would be pleased to have this Courts opinion upon the questions raised by our several assignments, but strong as these reasons are, we have not felt that we could, with justice to our client, or this Court, do less than suggest the want of jurisdiction in this Court, to revise the decision and judgment of the Circuit Court of Appeals in the case at bar.

If this Court in its wisdom shall be of opinion that it has jurisdiction to review the decision of the Circuit Court of Appeals in the case at bar, then we submit 1st: That the disposition of the case by the Circuit Court of Appeals is correct, and that the judgment of said Circuit Court of Appeals should be affirmed by this Court.

The Circuit Court of Appeals speaking through Justice McCormick, Circuit Judge in the disposition made, first considers the questions raised by the 4th. error assigned, and decides that the trial court erred in sustaining petitioners objections to the reading in evidence the depositions of one Emilio Velasco, a man learned in the laws of Mexico, duly verified and authenticated and returned into Court. (Record pages 93-97).

Our contention in support of our 4th. error was, that the action of the Circuit Court in rejecting the testimony of this witness was erroneous in that it assumed that the statutory law of Mexico is all of the law in cases of the character of the suit at bar affecting the right of recovery. Second: That it assumes that it is incompetent to offer testimony of one learned in the laws of a

foreign tongue and country, as to what the law is, whether written or unwritten; and third: That it assumes that it is incompetent to offer testimony in the nature of expert evidence as to the proper construction of a statute in a foreign tongue and country. (See page 16 of this brief, and authorities cited). The learned Circuit Judge in giving voice to the views of the Circuit Court of Appeals upon our 4th. error, beginning on page 92 of the record, states in substance the statue laws of Mexico, and the difficulties attending their proper construction, citing in addition to the authorities cited in this brief page 16 Story on Conflict of Law, Secs. 557, 558 and 563, Record page 95, concluding his able opinion upon our 4th. error by holding that the learned trial judge erred in sustaining the objection to the introduction of this proof. And further holding that for reasons stated in the discussion, they would take judicial notice of the testimony thus rejected by the trial judge, upon their consideration of the Writ of Error.

The petitioners complain of the able opinion of the Hon. Circuit Court of Appeals touching our 4th. error, in their petition for a rehearing. First. "Because the testimony of Emilio Velasco does not show what construction the Courts of Mexico place upon the Statutes of that country, but is only in substance a reiteration of the Statute law of that Country as pleaded, together with a statement on his part that the right of plaintiff is in the nature of alimony or pension to be paid in installments monthly, for periods of time fixed by the Court, and a further statement as to when the obligation to furnish alimony ceases. 2nd. Because the Court in considering the testimony of Emilio Velasco and giving such weight thereto, in the opinion of the Court, as should have been given to it on the trial, that deprives plaintiff of a valuable right, viz: to impeach, attack or rebut the same by the testimony of others eminent and learned in the laws of Mexico, and in preventing plaintiffs from showing, if such be a fact, that the judgment of Mr. Velasco may have been unduly, but honestly inclined to the interest of a client, and because the Court impro-

perly attached such consideration to the evidence of Mr. Velasco as would be accorded to the decisions of the Courts of Mexico." (See Record Pages 74 & 75).

In their petition to this Court for a Writ of Certiorari petitioners allege "that the Circuit Court of Appeals has erred in giving a construction to the laws of Mexico suggested by the statements contained in a deposition taken in the case, but which was not admitted on trial, and thus were your petitioners deprived of an important and valuable right, viz: To meet such testimony by evidence in rebuttal, and the statements so considered lead to an unreasonable construction of the laws of Mexico, not shown to be the construction placed upon those laws by the Courts of that country."

Petitioners in their brief (page 24) submit their proposition No. 5, touching the subject of our 4th. error in words as follows:

"The exclusion of the testimony of Emilio Velasco, if error, was not perjudicial–the testimony was merely acumulative; and wherein it was a mere opinion and did not show how the Courts of Mexico had, at any time, construed the laws of that country applicable to the issues raised in this suit, it was inadmissible."

The able counsel representing petitioners fail as this Court will note, to cite any authority, whatever, in support of their proposition; nor do they cite authority or give any reason why the Circuit Court of Appeals erred in concluding that the learned trial judge erred in sustaining the petitioners objection to the introduction of the testimony of Emilio Velasco, taken by deposition, duly verified and authenticated and returned into Court; nor do they cite authority, or state a well founded reason why the Circuit Court of Appeals erred in taking judicial notice of this testimony of one learned in the laws of Mexico, in arriving at a proper construction of the laws of Mexico plead.

Counsel for petitioners content themselves, under head of remarks page 25 of their brief in support of this fifth proposition by saying:

"Notwithstanding the exclusion of the testimony of the witness, the Honorable Circuit Court of Appeals gave it all consideration, as if it were all the evidence available." This language does an injustice to the able jurist speaking for the Circuit Court of Appeals. Justice McCormick says, on page 96 of the record, "*Without the aid of this testimony,* (referring to Velasco's evidence) *we would find it difficult to construe the limitations expressed in the latter part of article 319, above quoted, and especially the second one of those limitation; and while we probably would from the nature of the case and from a careful consideration of the statute pleaded and proved, have reached the conclusion that limitation 2, etc., etc.,* we should have felt the need of further proof which is offered to be suplied by the deposition of the learned lawyer." This language used by the able jurist hardly justifies the assertion of counsel, that the Circuit Court of Appeals "gave it all consideration as if it were all the evidence available." Counsel further beg the question in saying: "it might be shown by other distinguished lawyers of Mexico, that in some of the States of Mexico alimony, of which Mr. Velasco speaks, is recoverable either at stated periods or in one fixed amount."

This statement does counsel for petitioners an injustice, in this, that it must be presumed by this Court, that they had the right, or that they waived the right to cross-examine the witness, and thus establish, if a fact, that "alimony is recoverable either at stated periods, or in one fixed amount. It does counsel and injustice, in this, that their remark does palpable injustice to the witness, in this, that witness nowhere testifies that it is alimony, but upon the contrary, the witness swears that the right secured to a surviving wife and children "is in the nature of alimony or pension to be paid in installments monthly, for periods of time fixed by the Court; that obligation to pay alimony to the wife and

children does not imply that of giving a sum larger or smaller at once, but of giving a pension." Counsel further remarks "had the trial court admitted the testimony of Mr. Velasco, the adverse party would have been accorded the right to offer testimony in rebuttal. (Nobody disputes this statement). If the foreign law cannot be established by evidence like any other fact, the right of parties to adduce evidence of the fact to be established should not be cut off by closing the door against them." Counsel do themselves palpable injustice in that it implies their total ignorance of the elementary rule governing the manner of establishing foreign laws "that no court takes judicial notice of the laws of a foreign country but they must be proved as facts, and that the better opinion seems to be, that this proof must be made to the Court, rather than to the jury." Greenleaf on Ev. Sec. 486.

This rule has been time and again approved by this the highest Judicial tribunal on earth. The decisions of the Circuit Court of Appeals deprives petitioners of no rights not clearly attributable to their own neglect, or their own over-confidence in their position "that the statutory law of Mexico as pleaded, is best proved by the Statutes themselves," and if mistaken in their position, this Court cannot, and will not excuse such negligence. Courts from time whereof the memory of man runneth not to the contrary, have, always, in construing foreign laws, especially those conceived and expressed in a foreign tongue and language, had resort to testimony of witnesses having knowledge of such laws and idioms pertaining to the language in which such laws are couched or worded.

All human experience verifies the doctrine announced by Story that "no tribunal on earth, however, learned, could hope by any degree of diligence to master the laws and proceeses and remedies of all other nations and the qualifications and limitations belonging thereto."

Petitioners in their original petition filed in the Circuit Court

plead the statute laws of Mexico as the basis of their right thus recognizing the well established elementary rule that "in regard to the merits and rights involved in actions, the law of the place where they originated is to govern."

This rule has been approved by this Court from the date of its organization and may therefore be treated as established.

Again we submit that the consideration of the evidence of Mr. Velasco, if error at all, was not prejudicial to the rights of petitioners, because it is distinctly announced by the learned judge speaking for the Circuit Court of Appeals that *they probably would from the nature of the case, and from a careful consideration of the statute pleaded have reached the conclusion* announced.

We further submit that, independent of the evidence of Mr. Velasco, the construction given the statute of Mexico pleaded by petitioners by the Circuit Court of Appeals, is the only reasonable and rational construction of the said statutes.

It is therefore proper that we, in discussing this branch of the case, consider the statutes plead, and for this purpose, we group the statutes having reference to the right secured. 1st. Art. 301, Penal Code, Book 2, reads: "The civil liability arising from an act or omission contrary to a penal law, consists in the obligation imposed on the party liable to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses. Art. 304. reads: Reparation comprehends payment of all damages caused to the injured party, his family or a third person for the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must cause a proximate and inexcusable consequence. Arts. 305 and 306 cannot possibly aid us in arriving at a conclusion as to the nature of the right secured

to petitioners by reason of the homicide of husband and father, and we therefore omit them from this group.

Art. 307 refers to judicial expenses and we therefore omit same.

Art. 308 provides that civil responsibility cannot be declared except at instance of the party entitled to recover Art. 309 refers to duties of judges, what laws to be considered, etc., and may therefore be omitted as applying strictly to the remedy as contradistinguished from the right secured.

Art. 310 refers to the rights of the injured person, etc., and may be omitted. Art. 311 reads: The action to enforce civil responsibility demanding support of a person quilty of homicide is personal and belongs exclusively to the persons named at the end of article 318 as directly damaged. Consequently such action form no part of the estate of the deceased, nor is it extinguished, although the latter pardon the offence in life. Art. 318 reads: The civil responsibility that grows out of a homicide done without right, (or justification) comprehends the payment of the indispensible expenses of the burial of the body, the expenses and necessary charges made for the cure of the deceased, the damages that the homicide causes to the property of the deceased, *and the support not only of the widow descendants and ascendants of the deceased who were being supported by him, he being under legal obligation to do so, but also to the posthumous descenadants that he may leave.*

Art. 320 reads: In order to fix the amount which should be given as the *measure of support,* the ability of the party responsible for the killing shall be taken into consideration and the necessities and circumstances of the persons entitled to receive it. (Record page 5 and 6.)

The learned judge speaking for the Circuit Court of Appeals construing statutes of Mexico, plead by petitioners, says "It ap-

pears clear to us from a careful comparison of the different sections of the statutes, and a careful consideration of the depositions of the Mexican lawyer that, the right created by the Mexican Laws, is the right to a continuing support during the periods of time that support would have been due from deceased, and in the amount that it would have been due proportioned to his ability to give it and the necessities of those who had a right to receive."

Now if the deposition of the witness be eliminated, and not considered, is it possible, consistent with any known rule of construction of statute law, to say that these statutes do not create "the right to a continuing support during periods of time that support would have been due from the deceased, and in the amount that it would have been due, proportioned to his ability to give it and the necessities of those who had the right to receive it?" If not, it follows as a necessary sequence that the consideration of the deposition of the learned Mexican lawyer, by the Circuit Court of Appeals, was not prejudicial to the rights of petitioners.

The consideration of the evidence of Mr. Velasco, by the Circuit Court of Appeals, was proper, notwithstanding its rejection in the Circuit or trial court, because the rule as laid down by our ablest authors is, 1st. that all matters of law are properly referable to the Court, and 2nd. that the object of the proof of foreign laws is to enable the Court to instruct the jury what in point of law, is the result of the foreign law to be applied to the matters in controversy before them. Greenleaf Ev. Sec. 486. Story on Conft. of laws, Sec. 638.

The testimony of one learned in the laws of a foreing country, when offerred, stands, as any other evidence, whether it be statute, or decisions of a foreign country. If the testimony had been a statute or an authenticated decision, rejected, it is evident that notwithstanding its rejection, by the trial court, that an

appellate tribunal in reviewing the decisions of the lower court could properly consider the rejected evidence, or suppose such testimony had been admitted in the trial court, the appellate court could very properly, as is often done, give to it weight and influence not given it in the trial court.

In conclusion of this question, we beg to suggest that petitioners in their brief, p. 24, seem to waive or abandon the grounds insisted upon in their petition for are hearing in the Circuit Court of Appeals, and as insisted in their petition, p. 6, to this Court for a Certiorari. In their brief and only proposition touching the depositions of Mr. Velasco, they say "its exclusion if error, was not prejudicial–the testimony was cumulative; and wherein it was a mere opinion and did not show how the courts of Mexico had, at any time, construed the laws of that country applicable to the issues raised in this suit, it was inadmissable."

This proposition duel in form, states no reason, whatever, why the Circuit Court of appeals erred in resorting to the testimony of Velasco to aid in the construction of the statutes of Mexico. The fact that this learned lawyer cited no decisions of the Courts of Mexico construing the laws of that country applicable to the issues raised in this suit, goes to the weight to be given such evidence, rather than to its admissibility and consideration. Under such condition of the record, should not this Court treat the objections as waived by petitioners? If not, then we submit that the Circuit Court of Appeals was clearly right in holding that the trial court erred in rejecting the evidence of Velasco, and in giving to it consideration in arriving at a proper construction of the statutes plead.

It is proper that we, in this connection, call this Court, attention to a manifest error of petitioners counsel in their statement of the agreement between the parties, page 16 and 25 of their brief. It is stated that "it was agreed that the translations of the laws of Mexico, pleaded by plaintiff's and defendant were correct,

and are the laws of Mexico having application to this case." This statement is incorrect and misleading, and we assume that counsel in so citing the agreement, were innocently mistaken. The agreement actually made, reads: It is agreed by counsel upon both sides that the translations of the laws of Mexico, as set out in plaintiff's petition, and which translations are herewith filed and marked Exhibit "A" and "B" for identification with the records in this case, are correct translations of the laws they purport to be translations of, taken from the respective codes in said petition mentioned."

The Court will note that there is nothing so far that they "are the laws of Mexico having application to this case."

"And it is further agreed that the laws described in defendant's original answer, and plaintiff's supplemental petition are the laws of Mexico having application to this case." (Record page 19.) This agreement has reference to laws of Mexico described in defendant's answer record page 15, and to certain laws of Mexico attached to and forming part of petitioners first supplemental petition. Record p. p. 16, 17, 18 & 19.

It was not intended by this agreement to say that the laws plead by petitioners in their original petition, record p. p. 2 to 11, as a basis of their cause, had no application, or that they were the law having application, or that the laws described by defendant in its original answer, and by petitioners in their first supplemental petition, are the laws having application to this case.

It was simply meant and so treated in the trial court, as well as in the Circuit Court of Appeals, that these laws described in defendant's answer, and in plaintiff's first supplemental petition, were the laws having application to the defense set up by defendant, Recod p. 15.

We come now to the consideration of the final judgment and conclusions reached by the Circuit Court of Appeals in its

disposition of the case. The learned Judge concludes his able opinion as follows. "We therefore conclude that the right of survivors (plaintiffs) to recover damages for personal injuries resulting in the death of William Slater is alimony or pension payable in installments for uncertain and indeterminate periods, dependent upon conduct of beneficiaries and conditions impossible to forecast, and is therefore so dissimilar from the laws of Texas, and the common law, that the Circuit Court in an action at law cannot administer the same and enforce the rights of plaintiffs so as to do substantial justice between the parties" Record p. 98. The Circuit Court of Appeals upon the above conclusion reversed the judgment of the Circuit Court, and remanded the cause with directions to that Court to sustain special exception No. 2 filed by defendant on March 18th, 1901, and to dismiss the plaintiffs case. Record p. 98.

The Court will note that the Circuit Court of Appeals holds that the Circuit or trial court erred in overruling defendant's speciol exception numbered 2, filed March 18th, 1901 Record p. 14, and which reads: 2nd. "Defendant excepting further, says: that it affirmatively appears from plaintiff's petition that the right of survivors to recover damages for personal injuries resulting in death, is alimony or pension, payable in installments, and is therefore, so dissimilar from the laws of Texas, and of the common law, that this Court cannot administer or enforce said laws and rights."

The trial judge overruled the above special demurrer, to which defendant excepted, and saved its bill of Exceptions, Record p. 33 & 34 to the action of the Circuit Court in overruling defendant's exception No. 2 filled March 18th, 1901. Defendant's assigned, error, Record p. 66.

The same question involved in our 2nd. assigned error, and which was sustained by the Circuit Court of Appeals, was substantially involved in our first and third assigned errors. Our first

error went to the action of the Circuit Court in overruling our general and special demurrers, filed Dec. 4th, 1900 to plaintiffs original petition, Record page 12. Our third error went to the action of the trial court in sustaining plaintiffs exception (Record p. 16) to defendant's answer, filed March 18th, 1901 (Record pages 14 & 15). Our 1, 2 and 3 errors were in our original brief. (See p. p. of this brief), submitted together, because as conceived they all referred to same subject. In view of the conclusions reached by the Circuit Court of Appeals, and the disposition made by that Court, it became unnecessary to discuss our 1st. and 3rd. errors, except incidently in reaching a decision.

The main question, or rather controlling question presented by the reeord, is can the Circuit Courts of the United States consistently with their own forms, of procedure and law of trials, take jurisdiction of, and administer the laws of Mexico in the class of cases to which this case belongs, and do substantial justice between the parties plaintiff's and defendant giving to the plaintiffs the rights secured by the laws of Mexico, and at the same time secure to defendant its rights under that law?

If that cannot be done, then it follows, according to all the adjudicated cases, that the Circuit Courts should decline jurisdiction, or rather refuse to assume the power and responsibility of undertaking to administer such laws. See Huntington vs. Attrill, 146 U. S. 657-689 where this Court cites with approval, Higgins vs. Central New England R. Co. 155 Mass. 180, and which is cited by the learned judge speaking for the Circuit Court of Appeals in his opinion in the case at bar.

The question is one for the determination of the Sovereign appealed to, to enforce such foreign law. The fact one Sovereign power may refuse to assume such responsibility, can only be invoked before another sovereign because of the soundness of the reasons given for such refusal. One Sovereign may decline such

jurisdiction or responsibility for reasons another Severeign might deem not well taken.

The question as to the enforcement of foreign laws by the different States of the United States, has generally arisen out of resorts to the Courts of one of the States to enforce the laws of a sister State of our union of States. And in every instance, each State as a sovereign, has for itself, according to its own discretion of a sound public policy, decided whether it would take jurisdiction or decline to do so. In some instances in the history of our Federal Judicature, these courts have refused to follow the rule established by the decisions of the State Courts in which they hold sessions, in the class of cases to which this belongs. It is extremely to be regretted that such differences of decision should ever have arisen between the State Courts and Federal Courts, but these differences never the less do exist, touching what is, and what is not a sound public policy. In Texas, the State whose laws the Circuit Court, in which this cause was brought and tried, hold that they will decline to take jurisdiction, and assume the responsibility of undertaking to administer the laws of Mexico in ordinary personal injury suits. Mexican National R. R. Co. vs. Jackson, 89 Texas, 107. The United States Circuit Court of Appeals for the Fifth Circuit have refused to follow the decisions of the Supreme Court of Texas in that class of cases. Evey vs. Mexican Central Ry. Co. 81 F. R. 294. Mexican Central Ry. Co. vs. Marshall, 91 F. R. 933. We will hereafter have occasion to refer to these decisions at greater length.

It is also a well established rule of decision of the Supreme Court of Texas, to decline to take jurisdiction of claims for personal injuries resulting in death, even where the injuries occur in any of our domestic States or Territories, basing such refusal upon the fact that the Statutes of the States wherein the injuries happened, upon the rights secured, were materially different from the laws of Texas in relation to same subject. Railway vs. McCormick, 71 Texas, 660. Railway vs. Richards, 68 Texas, 375.

The Circuit Court of Appeals for Fifth Circuit, in a case filed in the Circuit Court in and for the Eastern District of Texas, wherein the plaintiff sought to recover for injuries resulting in death in the State of Louisiana, refused to follow the decisions of our State Supreme Court in the case of Railway vs. Richards, 68 Texas, 375.

We have not cited this condition of conflict existing between the State and Federal decisions upon the subject, with a view of undertaking to reconcile them, nor with a view of undertaking to criticize the soundness or unsoundness of either the one or the other; but to emphasize the correctnes of our proposition, that the question, as to whether the Courts shall, take jurisdiction and assume responsibility of administering the laws of a foreign country, is addressed to the sound discretion of the sovereign whose jurisdiction is invoked; and that it does not involve the denying of a legal right by our Courts to a person seeking legal redress.

We shall assume that it is now the accepted doctrine of this Court that the laws of the country where a cause of action originates, will govern in all matters touching the merits and rights secured.

We submit as elementary, so held by this Court from its organization, *that the Circuit Court cannot, in the trial of an action at law, exercise the power of a Court of Equity*, and that in all cases or causes of action in said Courts, the right will not be adjudicated and relief granted, when to do so, the power of a chancellor as contradistinguished from a law court, must be exercised.

Before undertaking to discuss the rights secured to the petitioners as survivors of Wm. H. Slater (the husband and father) under the laws of Mexico, the country where the right originated, we desire to call this Courts attention to a question suggested by petitioners in their original petition for the "Writ of Certiorari"

p. 4, paragraph 9 thereof, but which, so far as their brief and argument shows is abandoned, or rather not insisted upon now in this Court.

We submit, however, that the extensive border between this country and the Republic of Mexico," (the country whose laws this Court is now asked to enforce) coupled with the graphic description of the physical and business conditions existing along its border between the two republics, "does make the question of the proper adjudication of this case, one of gravity and importance, and of international concern."

Petitioners allege that they are citizens of and reside in Webb County, Texas. That defendant is a corporation and a citizen of the State of Colorado, and that it owns and operates a railway from the City of Laredo, Webb County, Texas, to the City of Mexico in the Republic of Mexico, etc. That plaintiff Lena M. Slater is surviving wife of William H. Slater, deceased, and that William F., Jesse R., Annie E and Henry C. Slater are the minor children of plaintiff Lena M. Slater and William H. Slater, deceased. That on the 20th day of May, 1900, and for a long time prior thereto, William H. Slater, deceased, was an employe of defendant as a switchman in the City of Nuevo Laredo, Republic of Mexico, in the yards of said defendant company at said place. Record p. 2. At the time of the filling of the petition (Nov. 17th, 1900) in the Circuit Court it appears that petitioners were "citizens of and residing in Webb County, Texas," but there is nothing in the petition or the record that even tends to show that the deceased in his life was a citizen of Texas, or of the United States-upon the contrary it affirmatively appears that he was on May 20th, 1900 and for a long time prior thereto, had been in the employ of the defendant company, as a switchman in its yards in Nuevo Laredo, Republic of Mexico, and if presumptions may be indulged, it may be and perhaps should be presumed that both he and his family at the time of his injury were citizens of and residing in Mexico.

In so far as the record in this case shows the Mexican National Railroad Company, defendant, owns and operates no railroad east of the eastern margin of the Rio Grande. It in fact, does not, but connects its track with the Texas Mexican Ry. Co. on the eastern margin of the Rio Grande. It therefore follows as a necessary and an inevitable result, that every judgment recovered in the Courts of the United States against defendant and other railroads in Mexico is the imposition of a tax upon the commerce and people of Mexico.

Judgments against railroads in Mexico growing out of personal injuries, whether resulting in death or otherwise, favor of persons or their representatives, who voluntarily seek and obtain employment upon railways in Mexico, must of necessity be taken into account in fixing tariffs or freights and passenger charges. They must therefore ultimately be paid by the people of Mexico, the patrons of such roads. There is no principle of public policy, or of comity between the United States and Republic of Mexico making it a duty of the courts of this country to take jurisdiction of such causes at the instance of person who "choose as a matter of convenience and not of necessity" such forum. Upon the contrary, it occurs to us, that for sound and indisputable diplomatic reasons, as well as for reasons of public policy between two powers so situated as Mexico and this country as represented by petitioners, and as in fact does exist, the necessity for the exercise of such jurisdiction, should be made to depend upon stronger reasons than mere convenience." The laws of Mexico having application to the subject under discussion, as well as civil rights growing out of their crimes act generally, forms a complete, if complex system of laws, fixing the rights of the injured with proper limitations, and other persons, with a view of protecting society generally securing surviving wife and children that support furnished by deceased persons in life. They provide courts for the adjudication of such matters, and even if those laws, upon examination as to the merits and rights, were found not

materially different from the laws of Texas, the courts of this country should not in response to voluntary appeals made as matter of pure convenience, undertake the responsibility of administering such laws, when to do so, is evidently the imposition of a tax upon the people of a neighboring republic.

The Supreme Court of New York, in a case for the recovery of damages for an assault and battery, committed by the Captain of a Brittish vessel, upon the high seas, both being Brittish subjects, in refusing to take jurisdiction of the cause, uses the following pertinent reasoning: that the courts of this country may take cognizance of torts committed on the high seas on board of a foreign vessel, where both parties are foreigners; but I am inclined to think, it must on principles of policy often rest in the sound discretion of the court to afford jurisdiction or not, according to the circumstances of the case. To say that it can be claimed in all cases, as a matter of right, would introduce a principle which might, oftentimes, be attended with manifest disadvantage, and serious injury to our own citizens abroad, as well as to foreigners here. Gardner vs. Thomas 14 John 134. The tort in that case, for assault and battery, was transitory at common law, and involved a right of universal recognition by all the civilized world. Yet for reasons well stated, the Courts of New York refused to exercise jurisdiction and assume the responsibilities that would necessarily have resulted to our own people, as well as those of Brittain.

The reasoning of the able judge speaking for the Supreme Court of New York in above case, while potent and convincing, certainly cannot be considered as strong, as those existing in the case at bar.

In that case no judgment rendered, was liable to create any burden upon the Brittish, not alike resulting to the people of New York.

In the case at bar, the result of any judgment rendered, is to

indirectly, if not directly, impose a tax, not only on the commerce, but upon the people of Mexico, a neighboring republic, with which our government is at perfect peace, not because of any necessity, but in response to a demand made for convenience.

In the New York case, no question of a material difference in construction of laws having application, existed. In the case at bar, the courts to grant any relief, must construe and apply a system of laws fixing the rights not only of a foreign country, but laws conceived by a branch of the latin race, in the Spanish language; a system of laws that must be construed, if correctly construed, with reference to idioms and maxims of that language as understood by that people.

The Supreme Court of Texas, in Mexican National R. R. Co. vs. Jackson, 89 Texas, 107, a case wherein this defendant was plaintiff in error. A suit by Jackson to recover damages for personal injuries sustained by him while in employ of defendant as a brakeman in Mexico say: "that the law of Mexico, under which plaintiffs claim originated, having been pleaded and proved by the defendant, the rights of the parties must be determined by its provisions. *It would be as unjust to apply a different law as it would be to determine the rights of the parties by a different transaction.* Story Conflict of Laws, 38.

This is a transitory action, and may be maintained in any place where the defendant is found, if there be no reason why the court whose jurisdiction is invoked should entertain the action. The plaintiff, however, has no legal right to have his redress in our courts; nor is it specially a question of comity between this State and the government of Mexico, but one for the courts of this State to decide as to whether or not the law, by which the right claimed, must be determined, is such that we can properly and intelligently administer it, with due regard to the rights of the parties.

The decisions of this Court (well maintained by high author-

ity) establish the doctrine that the Courts of this State will not undertake to adjudicate rights which originated in another state or country, under statutes materially different from the laws of this state in relation to the same subject." Citing Ry. vs. McCormick, 71 Tex. 660 and Ry. vs. Richards, 68 Tex. 375. The learned judge speaking for the Supreme Court of Texas, then proceeds to say: "Many difficulties would present themselves in an attempt to determine the meaning of the Mexican law and to apply it in giving redress to the parties claiming rights under it*******

We might or might not give the same effect to the language that is given to it by the courts of Mexico. There could be no reasonable certainty that the parties rights would be adjusted here as they would if the case were tried in the courts of that country, which is their right, for it is well settled that if our State undertakes to enforce the law of another state, the interpretation of that law as fixed by the courts of the other state is to be followed. This difficulty of itself furnishes a sufficient reason for the courts of this state to decline to assume the jurisdiction of this class of cases." The learned judge then proceeds to compare some of the provisions of the laws of Mexico, with the laws of Texas, demonstrating most conclusively the want of similarity between the two systems, concluding by calling attention to the provisions in the Mexican laws that provides "should the plaintiff recover from his injuries, to the extent that he would become able to pursue an occupation suitable to his education and social position, the defendant would have the right under that law to have the payment of damages awarded for diminished capacity to earn money reduced by the amount that plaintiff could earn in such employment." In this State, no judgment could be rendered which would secure this right, but the judgment must be entered for all probable future losses; hence the future earnings, no matter how great they might prove to be, could not go to reduce the damages already paid under such judgment as would berendered

in Texas. How this right would be secured in Mexico, we cannot see, unless payments were required by the judgment to be made in installments, or that future inability to earn money not being considered upon the first trial, the matter would be settled in subsequent suits to recover for such damages. In any event it is a right of the defendant which no court of this State can secure by its judgment."

The laws of Mexico in the above case were plead and proved by the defendant, and that such statute law created the right, and that such laws were so dissimilar to the laws of Texas, that those courts should decline to entertain jurisdiction and assume the responsibility of administering such laws.

The laws plead in that case were the same laws plead by plaintiff in the case at bar, save arts. 318, 319 and 320, securing to the surviving wives and children were omitted. This decision of the Supreme Court of Texas, has been very severly criticized by many of the bar in Texas, and by the bench in some instances. The learned presiding Circuit Judge of the Fifth Circuit, having done so, and that learned Court refusing to follow the decision of the Texas Supreme Court in that class of cases.

Notwithstanding the adverse criticisms of the decision of the Supreme Court, the writer of this argument, after long years of his best thought, is convinced from a consideration of the principles of abstract justice, that courts should always seek to enforce as applied to persons, communities and nations, that the judgment of the Supreme Court of Texas in declining to take jurisdiction and assume responsibility of adjudicating rights under the laws of Mexico, in the class of cases involved, was correct, viewed from any standpoint, and especially because it is impossible for any court in Texes, State or Federal, to enter and enforce a judgment in such cases that will secure either plaintiffs or defendants in the rights created by the laws of Mexico. No man can read and study the system of laws of the Republic of Mexico, relating to the

general subject of personal injuries whether resulting in death or not, without being impressed with the objects intended to be accomplished, and that they do and will accomplish when administered as they are evidently enforced by the courts of Mexico. In cases where death results, the purposes of the statute was to protect society against the obligation to support survivors made indigent by the wrongful homicide. Thus a two-fold purpose was provided against, the support of those dependent upon the deceased; and society against the necessity of supporting those persons that would otherwise have been supported by one obligated both by law and nature to do so.

The provision providing that support be secured to be paid in installment monthly, quarterly, semi-annually or annually, instead of damages awarded in a lump sum, is a wise provision and calculated to protect the beneficiaries agains waste and profligacy, and society against pauperism.

The law of Mexico is extremely humane, and yet exacting of the wrongdoer. The decision of the Supreme Court of Texas is based upon correct principles of comity. and if followed will promote the ends of justice, existing between two neighboring Republics.

In another part of this brief, and as submitted in the Circuit Court of Appeals, we distinguished the case at bar from Evey vs. Mexican Central Ry. Co. 81 F. R. 294, and with that we are content, except to say that the decision of the Supreme Court of Texas is evidently best calculated to promote justice.

The petitioners in their brief submit six propositions why they think that the judgment of the Circuit Court of Appeals should be revised and reversed by this Court. Their fifth proposition touching the action of the Circuit Court of Appeals in holding the Circuit Court to have erroneously refused to receive and consider the deposition of Mr. Velasco, as heretofore in this brief been copied

and replied to. The five remaining propositions read as follows to-wit:

FIRST PROPOSITION.

Under the laws of Mexico, a clearly defined right of action exists for damages arising from injuries resulting in the death of a person, against the person whose negligence was the proximate cause of such injuries, there being no contributory negligence on the part of the person injured; such action lies in favor of the surviving wife and minor children of herself and her husband, whose death so resulted.

SECOND PROPOSITION.

The civil action for damages for injuries resulting in death, under the laws of Mexico, is a personal action, transitory in its nature; and the right created by those laws not being contrary to the public policy of the State of Texas, nor calculated to injure the State of Texas, or the United States, or their citizens, the same may be enforced at law in the Federal Courts within the State of Texas—and in this suit, where, by personal process and an appearance, the wrongdoer has been subjected to the jurisdiction of the court.

THIRD PROPOSITION.

Damages for injuries resulting in death, the payment of which may be exacted from a railroad company under the laws of Mexico, is not alimony in the statutory meaning of that term; but, the support of which the wife and children have been deprived may be considered with other facts in determining the amount of the damages occasioned, and payment of such damages may be enforced in the courts of law of this country without reference to the procedure under the code of Mexico to enforce the payment of alimony.

FOURTH PROPOSITION.

Contingencies having arisen, under which, according to the

law of Mexico, the liability for damages for injuries resulting in death will cease, may be pleaded in abatement, or as a matter of defense, the effect of which would be to bar the remedy, rather than to extinguish the right; but, not having arisen, the court would not be called upon to sonstrue the law relating thereto; and while the action might abate, under the procedure of the foreign country, it would not necessarily abate under the procedure of our country.

SIXTH PROPOSITION.

As a defense to the action the defendant pleaded that damages prayed for in the case, recoverable under the laws of Mexico, was in the nature of alimony or pension, and could be recovered only under the procedure of that country for the recovery of alimony; and that such remedy could not be applied by our courts because of the difference between the laws of the two countries relating to the manner of granting the relief; the proof fails to establish such defense, and the judgment of the trial Court should be affirmed.

Before undertaking to reply to these several propositions, we will again call this Court's attention to the erroneous statement made by petitioners p. 16 of their brief, as to the agreement touching the laws of Mexico, as is evidenced by their own reference to the record p. 19. There was no agreement that the laws plead by plaintiffs and set out in full in their original petition were, or "are the laws of Mexico having application to this case," as stated by petitioners on page 16 of their brief, Record p. 19.

We submit in reply to petitioners first proposition, that the damages sought to be recovered by petitioners, is compensation for that support and maintenance given by Wflliam H. Slater, deceased, in his life time to petitioners, and this right secnred by the laws of Mexico, the country where the cause originated is in the nature of alimony or pension.

2nd. That petitioners must recover, if at all, upon the al-

legations as made in their pleading, upon proof sustaining the allegations as made in the court, whose jurisdiction is invoked.

In 2nd paragraph of petitioners petition it is alleged that plaintiff Lena M. Slater is the surviving wife of William H. Slater, deceased, and that the co-plaintiffs are the minor children of Lena M. and William H. Slater. Paragraph 7 plaintiffs set up the respective ages of plaintiffs and further allege "that William H. Slater at time of his death was 43 years old, and that he was an experienced brakeman; that be was in good health, was strong, frugal and industrious, and during his life time had performed, and was capable of performing a great deal of labor. He was a man of good moral character, and was sober and industrious, and at time of his death was earning about the sum of one hundred and twenty five ($125.00) dollars per month. That he (was) kind and indulgent to his wife and children, and during his married life he gave practically all of his earnings aforesaid to their *support and maintenance.*"

Paragraph 8 sets up that "decedents expectancy of life, according to the tables of mortality, was about 50 years, and plaintiffs during *their lives*, reasonably expected to receive, and in fact would have received in money fron the earnings of deceased thirty thousand dollars; that plaintiffs were each dependent for their *support* and *maintenance* upon the earnings of deceased, upon which fact and other considerations *particularly the legal obligations of the deceased to support them* and the love and affecfion for them they base their expectations of pecuniary aid from said deceased."

In paragraph 9 Plaintiffs allege that by the laws of Mexico, which now exist and existed and were in force at time and place of happening of the killing of William H. Slater, through defendant's negligence, as aforesaid, they the plaintiffs have had the right of action against the defendant for their damages, and they say that the following were and are the laws of Mexico, applicable to this case, out of which the said right of action grew, and by

virtue of which the same now exists in the said Republic of Mexico, towit: Here follows the translation of the laws of Mexico as plead, including those articles heretofore in this brief grouped and partially analyzed; and including article 325 giving the standard table of mortality that governs the courts of Mexico in adjudicating controversies growing out of the subject. (See record p.p. 2–11.)

The words, clauses and sentences italicised by us in the foregoing excerps from plaintiffs petition, the pleadings upon which the trial in the Circuit Court was had, are made to emphasize the correctness of our contention thar this is a suit to recover that support provided for in arts. 318 and 319 of the Mexican law as plead by plaintiffs (record p. 6) and which the learned Circuit Judge speaking for the Circuit Court of appeals denominates "alimony or pension payable in installments for uncertain and indeterminate periods, dependent upon conduct of beneficiaries and conditions impossible to forecast."

Art. 308, record p. 6, plead by plaintiffs, reads: "The civil responsibility cannot be declared except at the instance of the party entitled to recover." Art. 310 "The right to civil responsibility forms a part of the estate of a decedent and descends to his heirs and successors, provided it be not the case of the following article (311), or that it arise from injury or defamation, and that the offending person having been able in the life time to bring his suit, he neither did nor directed his heirs to sue; in such case the offense shall be understood as remitted."

Art. 311 that must be considered in construing arts. 318 and 319, reads: "The action to enforce civil responsibility demanding *support* of a person guilty of homicide is personal and belongs exclusively to the persons named at the end of art. 318 as directly damaged." The persons named at the end of artilce 318 includes the widow, descendant and ascendants of the deceased. It therefore follows that under these laws and the allegations as contain-

ed in plaintiffs pleadings, that the rights recoverable, is that of a support that is in the nature of alimony or pension, and that the Circuit Court cannot administer such relief consistent with its own forms ot procedure and trials, and give to the parties that protection that the laws of the country where the cause originated, provide.

Counsel for petitioners have not in their brief seen proper to attempt any analysis of the laws of Mexico, nor do they refer this court to any authority in support of their first proposition, contenting themelves by quoting an excerp from the opinion of Judge McCormick, without in any manner taking notice of its connection with the general subject under consideration.

We, therefore, submit that our proposition contra to theirs, is sustained by their own pleading and laws plead, and that while as an abstract proposition of law, they may be correct, it does not at all, follow, that the judgment of the Circuit Court of Appeals should be reversed. But upon the contrary it does appear that it should be affirmed.

We submit contra to petitioners second proposition, that the fact that this is a suit for the recovery of damages account of personal injuries resulting in death, and that such is, or is not transitory in its nature, does not give to plaintiffs the right to appeal to our courts to enforce a foreign law, but that the courts of this country will or will not take jurisdiction according to their own discretion, and that in all cases where the merits and rights of a controversy depends upon a foreign law of doubtful meaning, or wherefrom the nature of our own procedure of trials, our courts are unable for any reason to intelligently administer such foreign law, so as to fully and completely protect the parties involved in all their rights, as provided in such foreign law. then our courts both State and Federal. will decline to exercise jurisdiction and assume such responsibility as would necessarily attach.

The questioh as to whether or not the Circuit Court of the

United States, or the State Courts shall refuse to exercise jurisdiction of controversies arising under a foreign law, does not wholly depend upon whether such laws are similar or unlike, or whether they are materially different from the laws of the forum, but the principle and controlling reason is, can the courts of the forum, according to their own powers and forms of procedure, administer the foreign law, so as to fully protect all of the parties, both plaintiffs and defendants in all of the rights secured to either under the foreign law? If this cannot be done, then jurisdiction should be declined, especially so in every instance, where it appears that the jurisdiction is invoked for mere convenience and not from any necessity. Plaintiffs in this suit base their right of recovery upon a foreign law, a necessary allegation in the class of cases to which this case belongs, to show a right and by these laws, the rights of the parties must be determined. Story says: "It would be as unjust to apply a different law as it would be to determine, the rights of parties by a different transaction." (Story on conflt. of laws, Sec. 38).

The above elementary rule has been recognized as sound by this court in every case adjudicated by this Court demanding its application. In Dennick vs. Ry. 103 U. S. 11, cited by plaintiffs, Justice Miller giving voice to this Court says: "But the Courts of New York are as capable of enforcing the rights of the widow and next of kin as the Courts of New Jersey. *And as the court which renders the judgment for damages in favor of the administratrix, can only do so by virtue of the New Jersey Statute,* so any court having control of the administratrix can compel distribution of the amount received in the *manner prescribed* by that Statute.

This Court in the case above quoted, in another part of the opinion, says: "it is difficult to understand how the nature of the remedy or the jurisdiction of the courts to enforce it, is in any manner dependant on this question whether it is a statutory right, or a common law right.

Whenever, by either the common law, or the *Statute law of a State*, a right of action has been become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

The foregoing statement was evidently intended to apply to rights and legal liabilities that have become fixed at common law, or under Statutes of any of our domestic States, composing our own dual form of government. But whether so limited or not, it is immaterial to this discussion, as it is clearly announced by the learned judge speaking for this Court that the court entertaining jurisdiction can only do so by virtue of the laws of the country where the cause originated, and enforce such judgment in the manner prescribed by the Statute of such foreign state or country.

It therefore follows that we must determine 1st. the nature of the suit of plaintiffs as alleged in their complaint or petition filed in the Circuit Court: 2nd. the nature of the right secured by the laws of Mexico, the country where the cause originated; and 3rd. whether the rights secured by the laws of Mexico, are such as this court can intelligently administer under its own form of procedure and trial, enforcing the rights of the parties as prescribed by the foreign statutes plead.

As heretofore in this brief demonstrated, there is no escape from the conclusion that this is a suit by plainriffs as surviving wife and children to recover of defendant company that support given to them by the deceased, William H. Slater, during his life time (see paragraphs 7, 8 and 9 of plaintiffs petition, record p. p. 3, 4 and 5) as heretofore copied into this brief.

This suit by no possible construction of the affirmative allegations of plaintiffs, can be made to comprehend or authorize the recovery of that measure of damages the deceased William H. Slater would have been entitled to recover had his injuries not

resulted in death. His rights, if living, are fixed by Arts. 301, 304, 305 and 306, as qualified and limited by other provisions of the Statute law plead.

Art. 301 reads: "The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable to make (1) restitution, (2) reparation, (3) indemnization and (4) payment of judicial expenses."

Art. 304 reads: Reparation comprehends: Payment of all damages caused to the injured party, his family or a third person for the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission, complained of, or there be a certainty that such act or omission must necessarily cause, a proximate and inevitable consequence.

Art. 305 reads: Indemnization imports: The payment of damages, that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an omission by which formal, existing and not merely possible right is attacked, and for the value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done conformably with civil right.

Art. 306 reads: "The condition required by the two preceding articles (Arts. 304 and 305) that the damages and injuries should be actual, shall not prevent that the indemnization of subsequent damages and injuries be exacted by a new suit, when they shall have occurred; if they proceed directly from, and a necessary consequence of the same act or omission from which resulted the previous damages or injuries."

This latter article clearly shows that Arts. 304 and 305 refer to and fix the rights of the injured party in cases where he is the actor himself claiming damages resulting to "him and his family

or a third person" by reason of such injury; and while this right under the provisions of Art. 310 "forms a part of the estate of a decedent and descends to his heirs and successor." The same is immaterial in this case, because there is no allegation in plaintiffs petition claiming such damages, as the decedent would have been entitled to recover under such laws for such act or omission, had he been the plaintiff instead of his surviving wife and children. If the decedent had not been killed by his injuries, upon suit by him the measure of his damages, while of doubtful interpretation, may include perhaps, "the value of the time lost by him during the period necessary for his cure and while disabled from his injuries to work and labor, taking into consideration, the nature of his business and the value of his services in conducting the same; second, fair compensation for the mental and physical suffering caused by the injury; third the probable effect of the injury in future upon his health and use of his limbs, and his ability to labor and attend to his affairs, and generally any reduction of his power and capacity to earn money and pursue the course of life which he might otherwise have done, "and in addition such actual damages as "his family" or "some third person" may have suffered as the direct and proximate result of his injuries.

There is absolutely no allegation in plaintiffs petition authorizing the application of the foregoing measure of recovery. But this is unquestionably a suit for the recovery of that support to which plaintiffs have been deprived of by reason of the death of William H. Slater. This right is provided for in Arts. 318, 319 and 320. Art. 318 reads: "The civil responsibility that grows out of a homicide done without right (or justification) comprehends the payment of the indispensible expenses of the burial of the body, the expenses and necessary charges made for the cure of the deceased, the damages that the homicide causes the property of the deceased, and of the support not only of the widow, descendants and ascendants of the deceased, who were being sup-

ported by him, he being under legal obligations to do so, but also to the posthumous descendants that he may leave."

There is no allegation of any expenditure for burial of the body of deceased. Nor is there any allegation of any expenditure made for the cure of the deceased. Nor of any damages his death caused to the property of the deceased. Thus we find that the damages resulting to plaintiffs by reason of the withdrawal of that support given by deceased in his life, is all that can be considered in response to the pleadings.

This support is limited by article 319, a part of the same general system of law, and containedin same book, as the one providing for a suppor. This art. reads "The obligation to furnish support shall last during all the time deceased might have lived if the homicide had not killed him, and that shall be calculated by the judges according to the table at the end of this chapter, but taking into consideration the state of the health of the deceased before the homicide was committed. As limitations of *this rule* the obligation shall cease: 1 At whatever time it *shall not be absolutely necessary* for the subsistance of those entitled to receive it: 2 When those beneficiaries get married; 3 When the minor children become of age: 4 In any other case in which, according to law, the deceased, if alive, would not be required to continue the support."

These limitations upon the obligation, form a part of the statute giving and providing for the support and must of necessity be provided for in any judgment rendered for the recovery of such support. They are a part of the same chapter following in numerical order, the article creating the obligation of support, and according to well recognized rules of construction and interpretation must be considered as a part of the stature fixing the merits and rights.

In conclusion of this reply to petitioners 2nd. proposition, we

say that it clearly appears immaterial whether a "civil action for damages for injuries resulting in death under the laws of Mexico is a personal action, transitory in its nature"; or whether the right created by these laws "is contrary" or not "to the public policy of Texas, or whether or not, it is "calculated to injure the State of Texas or the United States or their citizens", as the question ultimately is, can our Courts Federal or State, intelligently entertain jurisdiction and secure to the parties the rights secured to them under the laws of Mexico? And especially, can the Circuit Courts, as common law courts, do so? The propounding of these queries is in our opinion to demand an answer that they cannot.

"It is obvious, and it has always been held, that the Circuit Court cannot, in a trial of an action at law, exercise the power of a court of equity. See Security Trust Co. vs. Black River Nat. Bank 187 U. S. p. 237.

The relief, merits and rights of the parties to this controversy, as created by the laws of Mexico, contemplate the exercise of powers by the Courts and judges never conferred upon or exercised by a common law court, not even in jurisdictions where the distintions between law and equity have been abolished.

Our reply to petitioners 1 and 2 propositions sufficiently answer their 3 proposition as made, and we pass it without further notice.

We are extremely doubtful as to whether we should dignify petitioners 4th proposition with any reply, and it is only because of our high appreciation of the ability of counsel that we do so.

The question evidently intended to be made by counsel in their 4th proposition, is, that the limitations upon the obligation of support as contained in Art. 319, heretofore copied into this brief, constituted under certain contingencies matters of defense to be pleaded in abatement protanto in proportion as they may

arise, etc. This is so evidently unsound, that it really requires no answer.

But we submit, as these limitations are a part of the same chapter, following next in numerical order art. 318 creating the right of support, defining what is meant by the obligation to furnish support, that they are not matters of defense, but are a part of the right itself, that must be taken into consideration by any court undertaking to administer the laws of Mexico in such matters. See authnrities and reasons given in our reply to petitioners 1 & 2 propositions in this brief.

Counsel in support of this proposition cite B & O. Ry. Co. vs. Jay, 173 U. S. 226, as authority in support of their 4th proposition, quoting the question certified by the Circuit Court of Appeals, 6th. Circuit, and the concluding paragrah of the opinion. As we view the questions involved in case at bar, and in the case cited, we are totally unable, to appreciate how by any process of reasoning the decision in that case has any application to the question raised by the petitioners proposition. In B & O. vs Jay, it appearse that John A. Hervey, a citizen of Ohio, on Oct. 18th, 1891, was a passenger on a train of the B & O. Ry. between Chicago, Ills. and Fostoria, Ohio. While upon the train as a passenger he was injured at Albion, Indiana in a collision caused by the negligence of the railroad company. He brought suit in the common pleas court, Hancock County, Ohio, to recover damages for the personal injuries he had thus received.

Upon petition of the railroad the suit was moved into the Circuit Court of the United States for Northern District of Ohio. After such removal Hervey died, and against the objection of the railroad. the action was revived in the name of the administrator of the deceased appointed by the proper court in Ohio. That in such cases the right of revival existed in the Courts of Ohio at time the cause was removed by the railroad into the U. S. Circuit Court. This Court in that case simply held that the right to

revive the suit in the name of the representative, as it existed under the laws of Ohio was a substantial right that "inhered in this action and accompanied it when in the life time of Hervey the Federal Court acquired jurisdiction of the parties and the subject matter. And that this right could not be defeated by reason of the provisions of Art. 955 Revised Statutes of the U. S,

Therefore the question in that case was, did the suit instituted by Hervey, the injured person, in his life time to recover damages, abate? or did it revive in favor of his representatives. In the case at bar, Slater, the injufed person instituted no suit in his life time, nor do the plaintiffs by any allegation seek to recover any measure of damages that Slater would necessarily have sought to recover, had his injuries not resulted in death, and he had been sueing to recover damages account of his injuries. There is absolutely no analogy between the case cited and the case at bar, and we are unable to understand why counsel of ability should cite the B & O. Ry. vs. Jay as authority in support of their proposition. The statement of counsel (page 23 of their brief) to the effect "had any such contingencies arisen after institution of suit, the case cited would indicate the course to be taken, viz: that the cause proceed to judgment according to the laws of the forum," is absolutely unsound, according to all authority.

We submit in reply to petitioners sixth proposition, that in so far as it undertakes to state defendants defenses as plead (record pages 14 & 15), it is erroneous and misleading in that it ignores the fact that plaintiffs interposed to said defenses as plead, a general and special demurrer (record p. 16), which demurrers the Circuit Court sustained (record p. 20) to which action of the Court defendant saved its bill of exceptions (record p. 34–36), and upon which bill, defendant assigned error; (record p. 65) and therefore the fact, if a fact, that the proof fails to establish such defense, would not justify an affirmance of the judgment.

We submit further that the defenses plead, appearing to be

the result or conclusions necessarily to be drawn from a proper construction of the Statute laws of Mexico plead by plaintiffs as a basis of their rights secured under the laws of Mexico, forming a substantive part of and attaching to the merits and rights under the foreign law plead, were proved by plaintiffs, when they introduced translations of the laws plead by them.

This proposition of ours is evidently sound, as clearly demonstrated in our argument in reply to petitioners 1st and 2nd propositions, as well as in other portions of this brief.

In conclusion of this brief and argument, without undertaking to offer in support of our 5th, 6th, 7th, 8th, 9th, and 10th assigned errors in addition to those given in another part of this brief, other than to call this Court's attention briefly to the fact, that the trial court, absolutely, in his charge to the jury, ignored the laws of Mexico plead, except to direct the attention of the jury to Art. 52 (Record p. 11) which reads: "The coaches and cars which enter into the makeup of a train shall have draw-heads of the same height, so that their centers will be opposite to each other." But upon the contrary charges the law "in reference to the duty of a railroad or master to employes, as defined by decisions of this Court, and as to the measure of damages to be allowed, the measure fixed by the Statutes and decisions of Texas in each branch citing the jury to the decisions record p. p. 59, 60 and 61. In doing this the able trial judge ignored the elementary rule, that the law of the place or country where the cause originated governs as to the merits and rights, and that "it would be as unjust to apply a different law as it would be to determine the rights of the parties by a different transaction."

We submit for reasons stated that the conclusions reached by the learned judge speaking for the Circuit Court of Appeals, are sound, just and reasonable, and that the judgment of that Court, reviewing the judgment of the Circuit Court. with directions to sustain our exception No. 2 filed March 18th, 1901, should be

affirmed by adding that our exceptions filed December 4th, 1900, be also sustained.

Respectfully submitted,

THE MEXICAN NATIONAL RAILROAD COMPANY

By Thos W Dodd and

DENMAN, FRANKLIN and McGOWN,
Attorneys of Record for Defendant.

[redacted]

[redacted]

Petitioners,

vs.

MEXICAN NATIONAL RAILROAD COMPANY,

On Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit.

[redacted] OF RESPONDENT [redacted]

THE MEXICAN NATIONAL RAILROAD CO.

BY

LEROY G. DENMAN,
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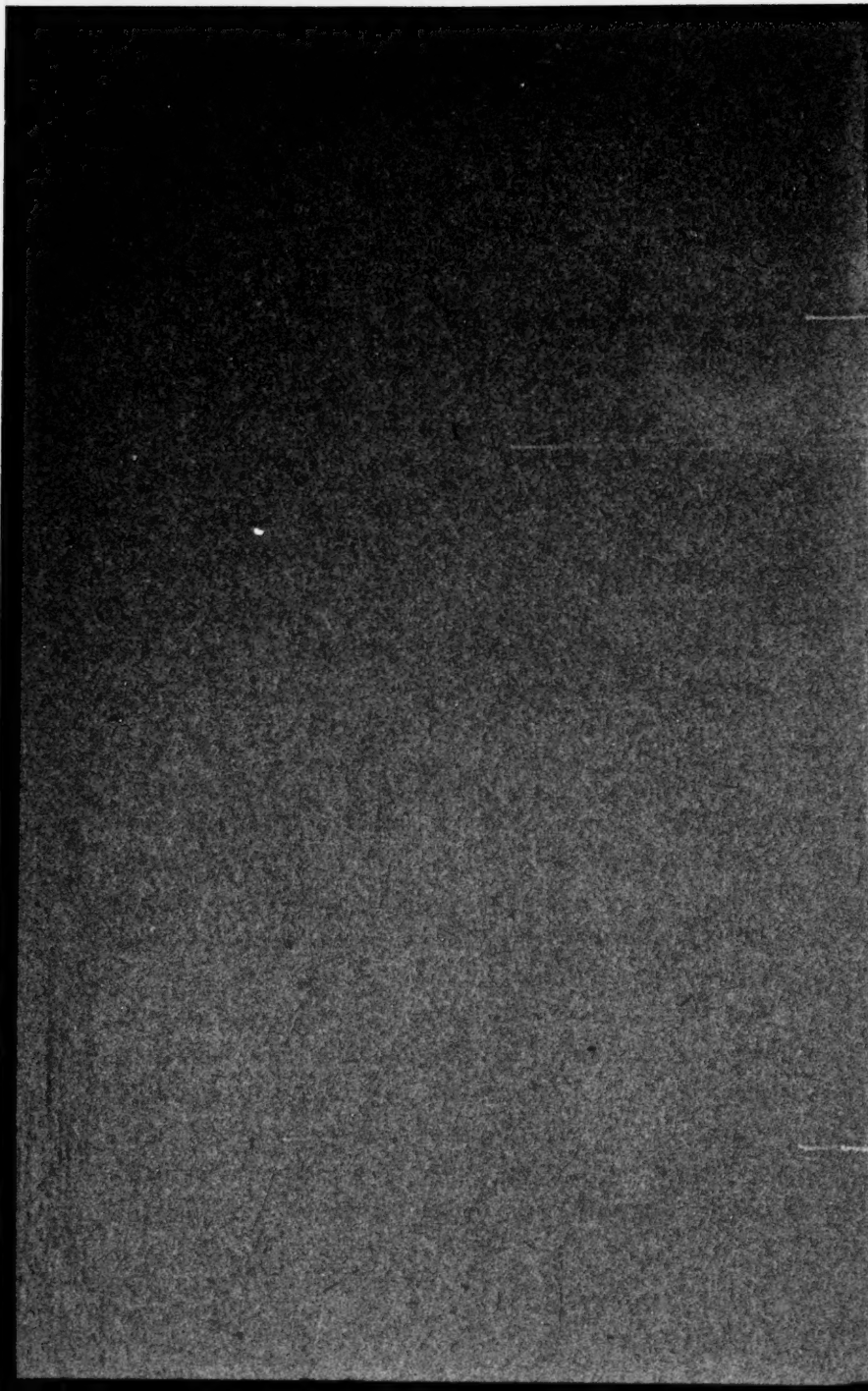

LENA M. SLATER, W. G. SLATER, JESSE R. SLATER, ANNIE E. SLADER and HENRY G. SLADER
vs.
MEXICAN NATIONAL RAILROAD CO.

No. 162.

Supreme Court of the United States.

May it please the Court:

We desire to submit a brief argument in addition to and in support of the brief heretofore filed herein by the respondent, the Mexican National Railroad Company.

PROPOSITION FIRST.

The right given by the Mexican law to the widow and children of Slater, in case his death was caused in Mexico by the negligence of the servants of the railroad, being one of support in the nature of alimony payable in installments, in amounts and during a period of time not ascertainable at the time of the accident or trial but dependent upon various circumstances thereafter to occur, no court has power or jurisdiction to administer that right unless the rules governing its procedure permit it from time to time after the rendition of the judgment fixing the liability for the accident, to inquire into and determine upon the application of either party whether the installments should be increased,

diminished or discontinued as to one or all of plaintiffs; and therefore the judgment of the Honorable United States Circuit Court of Appeals to the effect that the Honorable Circuit Court of the United States was without power or jurisdiction in the case, in that it could only render judgment as it did for a gross sum payable instantly, was correct and should be affirmed.

In order to determine the correctness of this proposition, it is important to ascertain *the exact nature* and *limitation* of the *right* conferred upon the plaintiffs by the Mexican statutes.

We will only quote here such of those statutes contained in the record as directly bear upon the question.

The civil responsibility for negligently causing the death of another in Mexico is directly fixed by the following articles from the Penal Code relating to "CIVIL LIABILITY in CRIMINAL MATTERS," to-wit:

"Art. 318. The civil responsibility that grows out of a homicide, done without right (or justification) comprehends the payment of the indispensable expenses of the burial of the body, the expenses and necessary charges made for the cure of the deceased, the damages that the homicide causes to the property of the deceased, and of the support not only of the widow, descendants and ascendants of the deceased, who were being supported by him, he being under legal obligations to do so, but also to the posthumous descendants that he may leave." (Rec. p. 6.)

"Art. 319. The obligation to furnish support shall last during all the time that the deceased might have lived if the homicide

had not killed him, and that time shall be calculated by the judges according to the table at the end of this chapter, but taking into consideration the state of the health of the deceased before the homicide was committed. As limitation of this rule the obligation shall cease: (1) At whatever time it shall not be absolutely necessary for the subsistance of those entitled to receive it. (2) When those beneficiaries get married. (3) When the minor children become of age. (4) In any other case in which according to law, the deceased, if alive, would not be required to continue the support." (Rec. p. 6.)

First it will be observed that said Article 318 fixes the items of responsibility at: (1) burial expenses, (2) expenses of sickness, (3) damage to property of the decedent by the homicide, and (4) the support of the widow and such descendants and ascendants of the deceased as *were being supported by him, provided he was under legal obligation to support them.*

The first three *items* of responsibility not being involved in this suit need not be discussed, but the fourth being involved demands notice.

It will be observed that the obligation imposed upon the *tort feasor* to support the persons mentioned depends upon two contingencies: (1) the deceased must have been supporting them at the time of the injury; and (2) he must have been under legal obligations to do so.

Let it be assumed for the purposes of this argument that Slater was actually supporting the plaintiffs, his widow and children, at the time of the injury resulting in his death. This would not alone entitle them to recover under said statute but he must be shown further to have been "under legal obligations to do so."

Now the only law pleaded and proved which goes to show such a legal obligation is to be found in Federal Civil Code, Chapter IV, pleaded by plaintiff (Rec. pp. 7 and 8), which law establishes the status between husband and wife, father and child and various other kindred in regard to the obligation respectively resting upon them of support; and this law must be resorted to in order to apply said Article 318 so as to impose upon respondent railway any obligation to support plaintiffs.

Article 206 of this law imposes upon the husband the duty of supporting the wife; Article 207 imposes upon the father the obligation of supporting his children; Article 208 imposes upon the children the obligation to support their parents; Article 205 provides that the obligation to give support is reciprocal; Article 211 provides that support comprehends eating, dress, habitation and assistance in case of sickness; Article 212 provides that the support of minors shall also include the expense of a primary education; Article 214 provides that the support should be proportioned to the ability of those furnishing and the necessities of those receiving; and Article 225 provides that the right to receive support cannot be renounced, nor is it an object of transfer or assignment, and a more correct translation of that article shown on page 18 of the record, provides that it cannot be *renounced* nor be made the *subject of a compromise between the parties.*

Taken as a whole these articles of the statute fix upon certain members of the family certain legal obligations with reference to the support of the others and forbids such parties from evading or relieving each other of such obligations, it being evidently the policy of the Mexican law to prevent a settlement *in solido,* the proceeds of which might be squandered and leave the parties

in need of the support either a charge upon society or without the means and opportunities of being reared and educated as useful members thereof.

Second, it will be observed that Article 319 above quoted undertakes to define the *extent* and *limitations* of the right to support referred to in Article 318 and in effect provides that it may continue as long as the deceased might have lived, calculating his probable life by a given table and considering his previous state of health; *but provides four other limitations upon the right,* to-wit: that it shall cease (1) at whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it; (2) when the beneficiaries get married; (3) when the minor children become of age; and (4) *in any other case in which, according to law, the deceased, if alive, would not be required to continue the support;* which last limitation evidently refers again to the provisions of said Federal Civil Code, Chapter IV, which is agreed to be correctly translated by Exhibit "A" to plaintiffs first supplemental petition (Rec. pp. 16 to 18), and Article 224 thereof provides, "The obligation to supply alimony ceases (1) when the one bound lacks the means of compliance; (2) when the dependent is no longer in need of alimony."

Thus it will be observed that Article 319 cannot be applied without referring to that portion of the Federal Civil Code aforsaid fixing the status as between relatives under the Mexican law in regard to support or alimony, and that such relative obligations are necessarily *limitations* upon the very *nature* and *extent* of the *right to support itself.*

Taken as a whole said Article 319 read in connection with said statute providing for support or alimony as between relatives

shows that the amount of money which the *tort feasor* may be liable for cannot be ascertained at the date of the death of the decedent, nor at the date of the trial, but is dependent upon conditions and circumstances thereafter to occur. The right, whether we term it support or alimony, is clearly not intended by the Mexican statutes to be made a matter of speculation or profit but is simply to impose upon the *tort feasor* to a *limited extent* the *legal obligation which the deceased* was under and *was actually performing toward the plaintiffs* at the date of his death. We say to a limited extent because said Article 318 as above shown does not impose the obligation of support upon the *tort feasor* in favor of all the kinsmen who had such a legal claim upon the deceased but *only to those of them whom the deceased was actually supporting,* and because said Article 319 does not impose the obligation of support of indigent children as fully as does said law of alimony, for it absolutely ends it when they get married or when they become of age; and to further show that these various provisions are *limitations* upon the right of support *beyond which it never existed* and not *conditions which will defeat the right,* we refer to Article 363 (Rec. p. 9), which reads:

"Article 363. Limitations: The various actions by which civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked, shall be extinguished *according to the terms and in the manner provided by the civil code* of the commercial code, according to the nature of the demand and the subject-matter treated of."

The principle upon which the Mexican law proceeds is eminently just and wise; for to the limited extent above indicated it

imposes upon the *tort feasor* the obligation of support which rested upon the deceased, and the decree of the court establishing that the homicide was caused by the negligence of the alleged *tort feasor* would fix "the civil responsibility under Article 318," but would leave the court under the provisions of said Article 319, considered in connection with the various articles of said Chapter IV and said Article 363, to increase, diminish or extinguish the periodical payments constituting such support at any time thereafter that it might be justified by the facts brought before the court.

That it was the settled purpose of the Mexican law that this sliding scale of payments should be made and that the limitations thereon as to time and amount should exist as a part of the right itself and not merely as a part of the remedy, is further evidenced by the fact that said Article 225 of Chapter IV as agreed to be correctly translated in Article 225 of Exhibit "A" (Rec. p. 18) provides that the right cannot be renounced by the beneficiary nor can it be the subject of compromise between the parties, and Article 218 of said Chapter IV, as shown in Exhibit "A" (Rec. p. 17), authorizes "the public department" to demand security for payment of the support or alimony. These provisions in connection with the entire laws above show that it is inconsistent with the very nature of the right granted and the limitations placed thereon by the Mexican law, for a court to undertake to adjudicate and administer the right unless it has the power under its procedure to increase, diminish or extinguish the payments from time to time according to the manifest spirit of the Mexican statutes. It is also evident from these provisions that this right of support is in the nature of a police regulation whereby the government fixes

between the *tort feasor* and the persons entitled to the support under said Article 318 a *status* of support and dependence which they cannot evade or settle by compromise or otherwise, and which may be enforced by the persons mentioned in said Article 218, one of which is "the public department."

Under these various statutes if these plaintiffs should at any time become residents of Mexico "the public department" as provided by said article of the statute could undoubtedly apply to a Mexican court and by establishing that Slater was negligently killed by the respondent's employes compel the respondent to provide for the support of his widow and children and such other persons as come within the provisions of Article 318, and the fact that the Circuit Court of the United States had in this cause rendered a judgment *in solido* for $7,000.00 in favor of the plaintiffs, and the fact that the respondent had paid said judgment in full would, we respectfully submit, be no bar to such action in the courts of Mexico because the Mexican courts could logically answer that the *right* administered by the Honorable Circuit Court of the United States *is not the right given by the Mexican law* and *does not carry out the very purpose and policy of that law,* but *directly thwarts the same* by undertaking to cancel a status of support and dependence established by that law between the *tort feasor* and the persons entitled to the support when that law forbids the cancellation or satisfaction of such status except by the performance of the obligation from time to time.

Again the Mexican statutes, in which this right of support for the death of Slater had its origin, does not, like the Texas statute which was administered by the Honorable Circuit Court at the trial, undertake to compensate plaintiffs for the damages the

jury may think resulted to plaintiffs from such death, under which the jury can and doubtless did consider all possible benefits they might have derived from the continued life of Slater, such as support, advice, gifts and even moneys he might accumulate and leave to them by will or inheritance, etc., but simply gives to them the *right of support limited by the various provisions of the statute referred to above;* and since a jury in undertaking to administer the Texas law as was given them in charge on the trial would necessarily arrive at a different amount than they would arrive at if given in charge the Mexican law with its various limitations, it is evident that the right adjudicated by the judgment of the Honorable Circuit Court on the trial below was an entirely different right from that given by the Mexican law. The Texas statutes and procedure do not permit of the administration of these intricate Mexican statutes in Texas courts, and the Supreme Court of Texas in the case of Jackson vs. Railway, 89 Texas Report, page 107, have so held; and since the United States Circuit Court are required by Revised Statutes of the United States, Article 914, to conform their proceedings as nearly as may be to the form and modes of procedure of courts of record of the State where the cause is being tried, it would appear that the Honorable Circuit Court of the United States has no procedure adapted to the administration of the right of support given by the Mexican law, and therefore no jurisdiction.

Jurisdiction is the power (1) to hear, (2) to determine, and (3) to enforce its decree. (89 Texas, 54; Riggs vs. Johnson Co., 6 Wall., 166.) If either of these powers be lacking, the court properly holds that it has no jurisdiction. Thus in De Poyster vs. Baker, 89 Texas, 160, the Supreme Court of Texas held that

although the language of the statute conferring jurisdiction to issue writs of mandamus was unqualified, still the court had no jurisdiction to issue such a writ in a case where there was a dispute as to a material fact, because the procedure provided for the Supreme Court was not such as to enable it in any of the recognized modes of procedure to determine such controverted fact, said court having no procedure for the taking of depositions, issuing of subpœnas, writs of attachment or the hearing of witnesses or the empaneling of a jury.

Again it is well settled that a court will not entertain a suit to compel the performance of a purely personal service such as compelling a songstress to sing, because there is no procedure provided by law for the enforcing of a decree establishing the obligation of the songstress to sing.

We contend that the Honorable Circuit Court of the United States has not any procedure whereby it can either properly proceed to a determination of the exact right given plaintiffs under the Mexican law or whereby it can after the right to support may have been established execute the decree with the limitations placed thereon by the Mexican law for the protection of the defendant railway's rights, and therefore that honorable court had no jurisdiction in the broad sense in which that term is used when applied to judicial proceedings.

Upon the whole, one cannot read the verdict and judgment rendered in the Honorable Circuit Court below for $7,000.00, which might have been for $15,000.00, as is often the case, and will doubtless occur in future cases if this judgment is sustained, without feeling that this judgment does not enforce in substance the right of support given under the Mexican law, but creates a

new right entirely foreign in its nature and in all probability excessive in its amount, and that by one stroke it attempts to settle and adjust between the parties a right of support which the Mexican law which created the right provided as a part thereof should not be settled or adjusted by the payment of a lump sum.

If the railroad company in Texas had entered into a contract agreeing to pay to the plaintiffs seven thousand dollars, and subsequently the Legislature of Texas had passed a law providing that contracts for the payment of money could be satisfied by the obligor undertaking the duty of support fixed by the Mexican law upon the railway in favor of plaintiffs under the provisions above, there could be no doubt that such a law would impair the obligation of the contract. Edwards vs. Kerzey, 96 United States, 595. And the same would be true if the railroad company had entered into a contract to support plaintiffs under the limitations imposed by the Mexican law above referred to and the Legislature of Texas had afterwards passed a law providing that such a contract could be discharged by the court rendering a judgment *in solido* as was done in this case. Both of the supposed laws would be unconstitutional and regarded as impairing the obligation of the contracts because the right given by the law would be different from the right given by the contract, or at least it could not be said that they are the same and their value would be affected.

Again, if this tort had been committed in Texas, where the law, as above indicated, permits the wife and children to recover whatever damages they may have sustained by reason of the death of Slater, which permits a very broad recovery, and after such death the Legislature of Texas had passed a law applying to

previous as well as subsequent torts giving the very right now given by the Mexican law in such a case, it is clear that such a law would be contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States to the effect. "Nor shall any State deprive any person * * * of property without due process of law;" for such subsequent law would not merely take away from the plaintiffs some of the remedies which they had for the enforcement of the right growing out of the tort under the old law, but would take away a large part of the recovery itself. (Louisiana vs. Mayor of New Orleans, 109 United States, 285.)

Again, if the death had occurred in Texas and the Texas statute had then given the same right of support to plaintiffs as is given by the Mexican statutes and subsequently the present Texas statute above referred to had been enacted giving the broader recovery *in solido* it could not be doubted that such subsequent statute applied to the previous cause of action would be contrary to said provision of the Fourteenth Amendment in that it would take the property of the railway without due process of law.

These illustrations based upon well adjudicated principles of constitutional law illustrate and make clear that the right administered by the Honorable Circuit Court of the United States was different in its nature from the right conferred by the Mexican statutes, and that it is not a mere question of difference of remedies as contended by petitioners herein.

PROPOSITION SECOND.

Since the statutes of Mexico above quoted provide that the right of support shall not be renounced or be the subject of compromise between the parties and further provide that such right may be enforced by "the public department" and others mentioned in Article 218, who may under the law of alimony be compelled at any time to support the plaintiffs after they have squandered the $7,000.00 given them by the judgment of the Honorable Circuit Court of the United States, it follows that said judgment of the Honorable Circuit Court of the United States is contrary to the policy of the very Mexican law which it undertakes to administer and not in accordance with the right given by the Mexican law, for it permits the parties by a suit to settle and adjust a right and sever a status fixed by the Mexican law which they could not under the law sever by any kind of an agreement.

If it be conceded that the Mexican law does not allow the *tort feasor* and the parties entitled to the support to rid themselves of the status or relationship imposed by the law by any kind of compromise or adjustment, it would appear to follow as a logical result that the court could not by judgment decreeing the payment of a specific sum accomplish that result. The judgment of the court should merely enforce the legal rights of the parties and should not permit them to do that which the very law creating such right prohibits.

In conclusion, we respectfully submit that the Republic of Mexico has given a right of support to plaintiffs with limitations indicated above and for the courts of this country to undertake under

the guise of administering that right to give a judgment *in solido* for damages in accordance with the Texas statute is just as much an invasion and an expansion of that right as it would be for a court to hold that a conveyance of a tract of land to *"A" until he is married is not a limitation of the estate itself,* and that it is not different from a conveyance of a *tract of land to "A" conditioned to be void upon his marriage,* it being elementary law that the former is a valid limitation upon A's estate in the land and that upon his marriage it ceases and terminates by force of its original creation and that in the latter the estate is absolute and carries the whole fee notwithstanding his marriage, the condition against marriage, which was intended to defeat the fee, being void as contrary to public policy.

The interest on the judgment allowed by the Honorable Circuit Court would doubtless provide for the support under the limitations of the Mexican law, leaving to the railway, the principal, when the obligation to suport is at an end, but the judgment of the Circuit Court turns over to the plaintiffs the entire sum at once.

Under a careful view the judgment of the Honorable Circuit Court administers a different right from that given by the Mexican law. It would seem that two quotations from the learned opinion of the Honorable Circuit Court of Appeals may here be aptly made, to-wit::

"Or if under our forms of procedure an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction. Higgins vs. Central New England Railroad, 155 Mass., 176, quoted with approval in Juntington vs. Attrell, 146 U. S., 657." (Rec. p. 91.)

"Possibly in the Texas State courts where the distinction between law and equity does not exist, or at equity in the courts of the United States, a decree might be passed fixing the liability of the defendant and retaining control of the parties to the suit and of the subject matter so as to enforce that liability with the limitations provided in the interest of the defendant. It is difficult to conceive what judgment at law the Circuit Court could render that would protect the interest of the defendant in the limiations put by the Mexican law on the plaintiffs right." (Rec. p. 97.)

We respectfully submit that the judgment of the Honorable United States Circuit Court of Appeals dismissing the cause for want of jurisdiction should be affirmed.

Respectfully submitted,

THE MEXICAN NATIONAL RAILROAD COMPANY,

By .....

For DENMAN, FRANKLIN & McGOWN.

Attorneys of Record.

Supreme Court of the United States.

No. 162.—October Term, 1903.

Lena M. Slater, W. G. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater, Petitioners,
vs.
The Mexican National Railroad Company.

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 11, 1904.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action brought in the United States Circuit Court for the Northern District of Texas by citizens and residents of Texas against a Colorado corporation operating a railroad from Texas to the City of Mexico. The plaintiffs are the widow and children of William H. Slater, who was employed by the defendant as a switchman on its road and was killed through the defendant's negligence while coupling two freight cars at Nueva Laredo, in Mexico. This action is to recover damages for the death. The laws of Mexico were set forth in the plaintiff's petition, and the defendant demurred on the ground that the cause of action given by the Mexican laws was not transitory, for reasons sufficiently stated. The demurrer was overruled, and the defendant excepted. A similar objection was taken also by plea setting forth additional sections of the Mexican statutes. A demurrer to this plea was sustained, subject to exception. The same point was raised again at the trial by a request to direct a verdict for the defendant. The judge who tried the case instructed the jury that the damages to be recovered, if any, were to be measured by the money value of the life of the deceased to the widow and children, and the jury returned a verdict for a lump sum, apportioned to the several plaintiffs. The judge and jury in this regard acted as prescribed by the Texas R. S. Art. 3027. The case then was taken to the Circuit Court of Appeals, where the judgment was reversed and the action ordered to be dismissed. 115 Fed. R. 593; 53 C. C. A. 239.

There is no need to encumber the reports with all the statutes in the record. The main reliance of the plaintiffs is upon the following agreed translation from the Penal Code, Book 2, "Civil Liability in Criminal Matters." "Art. 301. The civil liability arising from an act or omission

contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses."

"Art. 304. Reparation comprehends: Payment of all damages caused to the injured party, his family or a third person for the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, a proximate and inevitable consequence." Coupled with these are articles making railroad companies answerable for the negligence of their servants within the scope of the servants' employment. Penal Code Bk. 2, Arts. 330, 331; Regulations for the Construction, Maintenance and Operation of Railroads, Art. 184. We assume for the moment that it was sufficiently alleged and proved that the killing of Slater was a negligent crime within the definition of Article 11 of the Penal Code, and, therefore, if the above sections were the only law bearing on the matter, that they created a civil liability to make reparation to any one whose rights were infringed.

As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. *Stewart* v. *Baltimore & Ohio R. R.*, 168 U. S. 445. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. *Stout* v. *Wood*, 1 Blackf. Ind. 71; *Dennick* v. *Central R. R. Co. of New Jersey*, 103 U. S. 11, 18. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, *Smith* v. *Condry*, 1 How. 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. In *Northern Pacific R. R.* v. *Babcock*, 154 U. S. 190, 199, an action was brought in the District of Minnesota for a death caused in Montana, and it was held that the damages were to be assessed in accordance with the Montana statute. Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far

as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught. See further *Pullman Palace Car Co.* v. *Lawrence*, 74 Miss. 782, 801, 802, *et seq.*; *Morris* v. *Chicago, Rock Island & Pacific Ry.*, 65 Iowa, 727, 731; *Mexican National Ry.* v. *Jackson*, 89 Tex. 107; *Bruce* v. *Cincinnati R. R.*, 83 Ky. 174, 181; *Holmes* v. *Barclay*, 4 La. An. 64; *Atwood* v. *Walker*, 179 Mass. 514, 519; Minor, Conflict of Laws, 493, § 200. We are aware that expressions of a different tendency may be found in some English cases. But they do not cover the question before this Court, and our opinion is based upon the express adjudication of this Court and as it seems to us upon the only theory by which actions fairly can be allowed to be maintained for foreign torts. As the cause of action relied upon is one which is supposed to have arisen in Mexico under Mexican laws, the place of the death and the domicil of the parties have no bearing upon the case.

The application of these considerations now is to be shown. The general ground on which the plaintiffs bring their suit is, as we have stated, that there is a civil liability imposed on the railroad company arising from an act contrary to the penal law—a negligent crime, as it is called in the code. But the code contains specific provisions for the case of homicide. These necessarily override the merely general rule for torts which also are crimes. *Mutual Life Ins. Co. of New York* v. *Hill*, U.S. . By Art. 311 the right is personal to the parties mentioned in Art. 318, and is no part of the estate of the deceased. The specific cause of action is the killing of the deceased. So far as appears, apart from that and the following articles, these plaintiffs would have no right of action for the cause alleged. For Art. 304 seems to presuppose a right in the family, not to create one, and we cannot assume a general right of the members of a family to sue for causing death. By Article 318 civil responsibility for a wrongful homicide includes, besides the expenses of medical attendance and burial and damages to the property of the deceased, the expenses "of the support not only of the widow, descendants and ascendants of the deceased, who were being supported by him, he being under legal obligations to do so, but also to the posthumous descendants that he may leave." Then, by Art. 319, the obligation to support shall last during the time that the deceased might have lived, calculated by a given life table, but taking the state of his health before the homicide into consideration, but "the obligation shall cease: 1. At whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it. 2. When those beneficiaries get married. 3. When the minor children become of age. 4. In any other case in which, according to law, the deceased, if alive, would not be required to continue the support." It is unnecessary to

set forth the detailed provisions as to support in other parts of the statutes. It is sufficiently obvious from what has been quoted that the decree contemplated by the Mexican law is a decree analogous to a decree for alimony in divorce proceedings—a decree which contemplates periodical payments and which is subject to modification from time to time as the circumstances change. See, also, Arts. 1376, 1377, of the Code of Procedure, and Penal Code, Bk. 2, Art. 363.

The present action is a suit at common law and the Court has no power to make a decree of this kind contemplated by the Mexican statutes. What the Circuit Court did was to disregard the principles of the Mexican statute altogether and to follow the Texas statute. This clearly was wrong and was excepted to specifically. But we are of opinion further that justice to the defendant would not permit the substitution of a lump sum, however estimated, for the periodical payments which the Mexican statute required. The marriage of beneficiaries, the cessation of the absolute necessity for the payments, the arising of other circumstances in which, according to law, the deceased would not have been required to continue the support, all are contingencies the chance of which cannot be estimated by any table of probabilities. It would be going far to give a lump sum in place of an annuity for life, the probable value of which could be fixed by averages based on statistics. But to reduce a liability conditioned as this was to a lump sum would be to leave the whole matter to a mere guess. We may add that by Art. 225, concerning alimony, the right cannot be renounced, nor can it be subject to compromise between the parties. There seems to be no possibility in Mexico of capitalizing the liability. Evidently the Texas courts would deem the dissimilarities between the local law and that of Mexico too great to permit an action in the Texas State courts. *Mexican National Ry.* v. *Jackson*, 89 Tex. 107; *St. Louis, Iron Mountain & Southern Ry.* v. *McCormick*, 7 Tex. 660. The case is not one demanding extreme measures like those where a tort is committed in an uncivilized country. The defendant always can be found in Mexico, on the other side of the river, and it is to be presumed that the courts there are open to the plaintiff, if the statute conferred a right upon them notwithstanding their absence from the jurisdiction, as we assume that it did, for the purposes of this part of the case. See *Mulhall* v. *Fallon*, 176 Mass. 266.

So far as appears, the civil liability depends upon penal liability; no different suggestion has been made; and thus far we have taken it for granted that the defendant was within the penal law. The Circuit Court made the same assumption, although the question was one of fact, in case the jury should find the negligence relied upon to be proved. But whether or not a railroad company was subject to penalty for a homicide caused by

the negligence of its servants did not appear. It has occurred to us, although no such argument was made, that it might be sought to sustain the liability on a different ground. The alleged cause of the accident was the different height of the draw-heads on two cars which the deceased attempted to couple as they came together. By Art. 52 of the Mexican Railroad Regulations it is required that "the cars which enter into the make up of a train shall have draw-heads of the same height." By Art. 208 of the same "all violations of this law which companies (railroad) commit shall be subject to punishment by the administration of a fine up to five hundred dollars, which the department of public works shall assess, reserving always the right of individuals through indemnity and the liabilities which the companies may incur through criminal acts and omissions committed by them." It might be argued that these sections, coupled with Articles 301 and 304 of the Penal Code, to which we referred in the beginning, were enough to create the liability without regard to the question of homicide. To this it might be enough to answer that it does not appear that a law imposing a fine to be assessed by the department of public works is a penal law within the meaning of the code—that, as we have said in a different connection, when the tort relied on is a homicide the specific provisions for homicide override merely general rules, and that the plaintiffs come here relying, as they have to rely, upon a statute which gives them a right of action independent of the deceased, and that the statute is made expressly and only for the case of homicide. Penal Code, Bk. 2, Art. 311.

But what we last have said brings into consideration another error of the Circuit Court which hitherto we have not mentioned. The defendant offered the deposition of a Mexican lawyer as to the Mexican law. This was rejected, subject to exception, seemingly on the ground that the agreed translation of the statutes was the best evidence. So no doubt they were, so far as they went, but the testimony of an expert as to the accepted or proper construction of them is admissible upon any matter open to reasonable doubt. Many doubts are left unresolved by the documents before us. The expert would have testified that where no criminal proceedings had been had, the right of the widow and children was dependent upon the Court's finding that the killing was a crime as defined by the penal code, and that the right was in the nature of alimony or pension to be paid in installments for periods of time fixed by the court. Without stating his testimony more fully, we have said enough to show that it should have been received. Seemingly he understood that he was testifying in a case against a railroad, and if so he furnished further reasons for denying any liability except on the footing of homicide. In a case of homicide he excluded the argument that there was a right to a lump sum under Arts.

301, 304, distinct from the right to alimony, and he confirmed the conclusion drawn from the language of the code as to what would be the nature of a Mexican decree in such a case. There may be other matters which would have to be considered before the verdict could be sustained, but what we have said seems to us sufficient to show that the judgment of the Circuit Court of Appeals should be affirmed.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 162.—October Term, 1903.

Lena M. Slater, W. G. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater Petitioners, *vs.* The Mexican National Railroad Company. } On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 11, 1904.]

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan and Mr. Justice Peckham, dissenting:

Slater, the deceased, was a citizen of Texas, residing at Laredo in that State. The Mexican National Railroad Company was a corporation of Colorado, owning and operating a railroad from Laredo to the City of Mexico. Its superintendent resided in Laredo. Slater was fatally injured through the negligence of the company while working in its yard in New Laredo, just across the Rio Grande in Mexico, and died in Laredo from the injuries so inflicted. His wife and children, who resided in Laredo, brought this suit in the Circuit Court of the United States, diverse citizenship being the ground of jurisdiction, and no objection in that regard arises. Defendant did not "happen to be caught" in Laredo, but was domiciled there.

The laws of Texas provided that an action for damages on account of injuries causing death may be brought when the death is caused by the wrongful act, negligence, unskillfulness or default of another, and without regard to any criminal proceedings in relation to the homicide. The jury are to give such damages as they may think proportioned to the injury resulting from the death, to be divided among the persons entitled in such shares as found by the verdict. The jury pursued that course in this case under the instructions of the Circuit Court.

By the laws of Mexico, damages are recoverable for death by wrongful act, but they, it is said, are awarded as support by decree in the nature of alimony or pension.

As the two countries concur in holding that the act complained of is the subject of legal redress, the question is whether recovery in this cause must be defeated because the law of Mexico controls and cannot be enforced in Texas.

It seems to me that the method of arriving at and distributing the damages pertains to procedure or remedy, that is to say, to the course of the court after parties are brought in, and the means of redressing the wrong, and I think the general rule that procedure and remedy are regu-

lated by the law of the forum is applicable. 2 Rawle's Bouvier, 870; *Kring* v. *Missouri*, 107 U. S. 231; *Stewart* v. *Baltimore & Ohio Railroad Company*, 168 U. S. 445.

In *Northern Pacific Railroad Company* v. *Babcock*, 154 U. S. 190, 199, the company was not a corporation of Minnesota, and the ruling simply was that the right to recover was governed by the *lex loci*. The amount found was within the law of Minnesota as well as that of Montana.

The extent of damages does not enter into any definition of the right enforced or the cause of action permitted to be prosecuted. Finch, J., *Wooden* v. *Railroad Company*, 126 N. Y. 10.

In *Scott* v. *Lord Seymour*, 1 H. & C. 217, which was an action by one British subject against another for an assault committed in a foreign country, it was held unanimously by the Courts of Exchequer and of the Exchequer Chamber that the objection that by the foreign law compensation in damages could not be recovered until certain penal proceedings had been commenced and determined there, was an objection to procedure merely, and not a bar to the action in England. And many of the judges were of opinion that an action was maintainable for any act which would have been a tort if done in England, and, whether actionable or not, was unjustifiable or wrongful, in a broad sense, under the law of the foreign country where the act was done.

Mr. Justice Wightman, (Willes, J., in effect concurring,) specifically held that if an action would lie by the English law for a particular wrong, the English courts would give redress for it, though it was committed in a country by the laws of which no redress would be granted, if the parties were both British subjects.

This case has never been overruled, and is cited as authority by Mr. Pollock in his work on Torts, 6th ed. p. 201.

At all events, the rule in England is well settled, as thus laid down in *Machado* v. *Fontes*, (1897) 2 Q. B. Div. 231: "An action will lie in this country in respect of an act committed outside the jurisdiction if the act is wrongful both in this country and in the country where it was committed; but it is not necessary that the act should be the subject of civil proceedings in the foreign country." *Phillips* v. *Eyre*, (1870) L. R. 6 Q. B. 1, and *The M. Moxham*, (1876) 1 P. D. 107, were there cited and applied.

In *Phillips* v. *Eyre*, Willes, J., delivering the opinion of the Exchequer Chamber, said: "As a general rule, in order to found a suit in England, for a wrong committed abroad, two conditions must be presented, first, the wrong must be of such a character as to be actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done."

In *The Halley*, L. R. 2 P. C. 202, Lord Justice Selwyn, speaking for the court, said: "It is true that in many cases the courts of England inquire

into and act upon the law of foreign countries, as in the case of a contract entered into in a foreign country, where, by express reference, or by necessary implication, the foreign law is incorporated with the contract, and proof and consideration of the foreign law therefore become necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English court admits the proof of the foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is, in their Lordships' opinion, alike contrary to principle and to authority, to hold, that an English court of justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."

The rule in this court goes further, for "by our law, a private action may be maintained in one State, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the State where the suit is brought." *Huntington* v. *Attrill*, 146 U. S. 670.

It is enough that the act complained of here was wrongful by both the law of Texas and the law of Mexico, and in such a case the action lies in Texas, except where the cause of action is not transitory, but is purely local such as trespass to land. *Dennick* v. *Railroad Company*, 103 U. S. 11; *Railway Co.* v. *Cox*, 145 U. S. 604; *Ellenwood* v. *Marietta Chair Company*, 158 U. S. 105; *Mitchell* v. *Harmony*, 13 How. 115; *McKenna* v. *Fisk*, 1 How. 271.

It is suggested that the Texas courts have held that there can be no recovery in Texas because of the dissimilarity in the ascertainment of damages between the law of Texas and that of Mexico. And this seems to have been so ruled in *Mexican National Railway* v. *Jackson*, 89 Tex. 107, but the question is one of general law, and we are not bound by that ruling. Moreover, the railway company is stated in that case to have been "a Mexican corporation whose line of railway extended into Texas," whereas in this case the company is a corporation of Colorado, domiciled in Texas, and whose line of railway extends from Texas into Mexico. Again, after that decision was rendered, in *Mexican Central Railway Company* v. *Mitten*, 13 Tex. Civil App. 603, the company being a Massachusetts corporation and Mitten a citizen of Texas, the Court of Civil Appeals for the Fourth District of Texas held to the contrary.

The court said: "If the construction placed upon the decision in the Jackson case be the true one, and some of its expressions would seem to justify the construction, it is a practical denial of remedies for wrongs that may be inflicted by one of our citizens upon another in Mexico, . . ." and: "We are not willing to subscribe to such doctrine and will not extend the scope of the decision referred to beyond the purview of the facts of that case."

The Supreme Court of Texas apparently accepted this view for it refused to grant a writ of error to review the judgment. 13 Tex. Civ. App. v. And see *Evey* v. *Mexican Central Railway Company*, 81 Fed. Rep. 294.

I entirely agree with the views expressed in *Scott* v. *Seymour*, to which I have referred. The legal relations of Slater with the United States and Texas were not destroyed by his crossing the Rio Grande to work in the railroad yard. This Colorado corporation was domiciled in Texas, as Slater was. The laws of Texas protected them alike. The injury was inflicted in Mexico and resulted fatally in Texas. The wrongful act was actionable in Texas and in Mexico.

The jurisdiction of the Circuit Court over person and subject matter was unquestionable, and I cannot accept the conclusion that the form in which the law of Mexico provides for reparation to its own citizens constitutes a bar to recovery in Texas in litigation between citizens of this country.

My brothers HARLAN and PECKHAM concur in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.